

A TREATISE
ON THE
LAW OF RES JUDICATA:

INCLUDING
THE DOCTRINES

Jurisdiction, 'Bar by Suit, and Lis pendens.

BY
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PUBLISHERS :

WILLIAM CLOWES & SONS, LONDON.
WILLIAM GREEN & SONS, EDINBURGH

1894.

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PRINTED AT THE
EDUCATION SOCIETY'S STEAM PRESS,
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To

THE RIGHT HONORABLE

FARRER BARON HERSCHELL,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

THIS WORK IS,

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Respectfully Dedicated

BY

THE AUTHOR.

P R E F A C E.

I HAVE for a long time noticed that the Courts, and, to some extent, even the Legislature, of one country do not derive that assistance from the deliberations and declarations of eminent Jurists and Judges in other countries to which their high judicial value entitles them; and lawyers in every country often devote their time and energies to the discussion and determination of questions that have been already most fully debated and elucidated in others. Enactments are thus sometimes made, and cases frequently disposed of in one country in accordance with principles which are there regarded as indisputable, but which are not only in direct conflict with those recognized and acted upon elsewhere, but have themselves, in some instances, after a long trial, been found inconsistent with the proper administration of justice, and deliberately abrogated or tacitly relinquished as unsound. Decisions of English courts are, no doubt, often relied upon in this country, and sometimes cited even in British Colonies and the United States, but the decisions in the latter are seldom referred to in the English Courts, and are hardly known in this country. Again, decisions of even the highest Indian Courts appear to be unknown in England and are absolutely so in the United States, although the Indian Law is now composed, to a great extent, of Codes that are mostly based on the case-law of England and not seldom derive their inspiration even from the Codes of Louisiana or of other States in America. Even the non-statutory law of India is, in the name of the principles of justice, equity, and good conscience, taken almost entirely from general principles declared and established by English courts; the analogies of the English law affording the most accessible and convenient, if not, in every case, the safest and best guide to the courts in this country. The British Indian system of jurisprudence has now, no doubt, acquired a consistency sufficient to be able to stand alone, and is not under an absolute necessity of borrowing from English or American precedents; but some of its departments, for example, that of torts, are still very meagre, and may, with

advantage, enrich themselves with principles and illustrations from foreign sources. Besides on account of the common origin of the Indian, the American and the modern English systems of jurisprudence, one always readily lends itself to the illustration of the others upon any legal topic, and no system can be so complete as not to be all the better for some help from other systems of independent and similar growth. A more frequent reference to, and the use of, the labours of those engaged in the same work is always conducive to a better accomplishment of that work ; and this is especially so in regard to sciences, that are naturally based on a generalization not only of facts but of general rules and principles. Differences of religion, manners, habits and customs, whether due to physical, climatic, or other less permanent causes, after all cover only a very limited area of man's nature and life, which in most respects are everywhere the same, subject to same impulses, same springs of thought and action, and with same tendencies for forbearance and inaction, and on which all science relating to man as a social being must be based, and all jurisprudence and legislation must finally rest. A better knowledge of the laws and judicial principles of different countries cannot therefore fail to conduce materially to the advancement of the science of true jurisprudence and the simplification and assimilation of legislation in civilized countries, an object that has acquired particular importance for the proper administration of justice in the modern days of increasing mutual intercourse of foreigners, and is engaging the attention of jurists and practical statesmen as well as of incessant International Conferences and Congresses, both in Europe and America. Nor is a knowledge of the laws of other countries of less importance for ordinary domestic administration of justice. Where, and so far as, law has not been codified, the value of such knowledge for that purpose cannot be over-estimated ; and in these days of physical and social progress, what country has or can have a complete code providing for all the exigencies and possible requirements of all its people. But even where law is codified, a knowledge of the general principles followed, and of interpretation and construction of similar enactments adopted in other countries, is of considerable use in helping and relieving the labours of

judges and lawyers, especially when the language of any enactment is indistinct or ambiguous, or a decision has to be given in regard to cases which do not clearly fall within it.

An important object of this work is to practically illustrate the great advantage accruing to the municipal law of every country, both in regard to its development and practical application, by a familiar acquaintance on the part of those concerned in its administration with the corresponding principles recognized and acted upon in other countries, an advantage not restricted to any particular branch of law and extending even to the codified branches of it. The doctrine of *res judicata* in its application to civil proceedings has been selected to form the subject of this work on account of its practical importance and unusual difficulty. It has been formally enacted in British India, but the enactment is incomplete and not free from obscurity, and as observed by Sir Whitley Stokes, to whom it owes a great deal of its present form, the doctrine of *res judicata* "is a subject of which the importance in a country inhabited by a litigious population is only equalled by the difficulty of dealing with it clearly, concisely and accurately in a legislative enactment." Indeed nothing so fairly demonstrates the persistence of litigants as their constant efforts to escape the consequences of prior judgments. Scarcely a month passes in which it does not become necessary in some Court of last resort in this country to determine the conclusive effect as a bar or an estoppel of some prior judgment. A glance at the authorized Reports of the Indian Courts will show that there are but few particular doctrines that have more frequently engaged the attention of the Courts than the question of *res judicata*. Starting from a maxim couched in half a dozen words, elaborate rules have developed out of the multiplicity of controversies coming before the Courts with a thousand minute shades of difference, "until by perpetual classification and sub-division, the jurisprudence of the subject has obtained a breadth, a depth, and a closeness of texture, which would seem to promise an immediate precedent for the decision of any imaginable case." Midst this general symmetry there is a real conflict of opinion in regard to some of the constituents of the doctrine, leading to a corresponding conflict as to the construction of the various clauses

of the rule as enacted by the Indian Legislature. In such cases I have not refrained from expressing my own opinion, though “dogmatic assertions and arrogant opinions have no proper place in the law,” and “to find judges of eminence differing upon nearly every question, is enough to shake one’s confidence in his own infallibility.” In some cases, the labyrinthal confusion of conflicting decisions is, however, merely apparent, and due rather to the “infinite variety exhibited in the facts of the different cases and the necessity of making nice discriminations in the principles to be applied.” And while the case-law relating to the subject is voluminous, no attempt has hitherto been made, at least, in India or England, to reconcile the conflicting decisions, or to treat the subject systematically with a due regard either to the ultimate basis of the rule, or to the “various distinctions, ramifications, modifications, exceptions and diverse bearings” thereof.

To supply this desideratum is the other main object of this work. An attempt has been made throughout it to preserve an orderly and scientific arrangement. After giving a general conception of the doctrine of *res judicata* in the first Chapter, the various questions arising in connection with the ‘matter in issue,’ the ‘decision,’ and the ‘parties’ are treated in the second, third and fourth Chapters respectively. The subject of the jurisdiction of Courts is an essential constituent of the doctrine of *res judicata*, and is treated at length in the next three Chapters. The subjects of judgments *in rem* and of foreign judgments are treated in the eighth and ninth Chapters. To make the work complete, the doctrines of bar by suit, of *lis pendens*, of bar by jointness, of merger, and other cognate matters have been discussed in the last three Chapters. The legal literature on these subjects, both in India and England, is extremely scanty, there not being in fact a single work in either country devoted exclusively to any of them.

This work, to a great extent, presents the law by “way of a review of the cases upon a statement of their facts,” the principal decisions on the various points in India and England being grouped under the respective clauses of the Indian rule of *res judicata* bearing on those points. In fact, these decisions may be said to form the ground-work of the

treatise, altogether about four thousand being cited, and of the published cases only those omitted from reference, the facts of which as stated in the reports cannot warrant any inference in regard to any disputed principle or specific proposition of law. Nor has the valuable help to be derived from English text-books been ignored. Frequent reference has accordingly been made to the note to the *Duchess of Kingston's Case* contained in Smith's Leading Cases, to the works of Mr. Pigott on judgments and jurisdiction of foreign Courts, and to the various works dealing with the law of estoppel. In the discussion and elucidation of abstract general principles, help has been taken from the labours of Roman and French jurists, among whom special mention may be made of Heraldus, Tiraquellus, Strycknis, Griolet, Pothier, Lacombe, Moreau, and Constant, many extracts being given from the published works of the last four, as the latest works available at the time of the preparation of the work for press. To illustrate the practical application of the principles, as well as to furnish a safe guide in cases not provided for by the rule of *res judicata* or the Indian case-law bearing on it, the principal decisions of the American and Federal and State Courts have also been referred to, the citation being made chiefly from the publications of the National Reporter System, and from the excellent series which the legal public owes to the labours of Mr. Freeman and his associates, and the reports of cases in which, being taken from the authorized State Reports, may be deemed as having official authority. Particular obligations of the author are also due to the excellent works of Messrs. Freeman, Black, Herman, Bigelow, Wells, Vanfleet, Hawes, Bennett, and other standard writers who have contributed so richly to the legal literature of America. In taking assistance from foreign decisions and foreign authors, care has been taken to distinguish and omit every thing based on special provisions of local and particular enactments, and to adopt and incorporate only what was based on general principles or on enactments similar to those in force in this country.

It is hoped that this work as a repertory of a mass of legal learning on the subjects treated in it will not fail to be useful in any country, but it will be particularly

valuable to the legal profession in India ; as the treatment of the subject, though of an extensive character, is mainly Indian, and, to a great extent, restricted to such aspects of the doctrines as have especial importance in this country. As the reports of the Indian decisions must be altogether unknown in America, as those of the American decisions are in India, and both are inaccessible to the majority of lawyers in England, excerpts from the opinions of the Courts have been freely introduced. In fact, especial care has been taken to employ in the enunciation of principles, and even in the statement of ordinary propositions of law, the *ipsissima verba* either of judges or of eminent lawyers, so that the statements made may carry a weight which cannot attach to the words of an unknown author. The difficulty of this mode of treatment has been particularly great, since the author, denied all access to any public or official library, has had, during the actual preparation of the work for press, to rely entirely on the unaided resources of his own private library. This course has further materially added to the size of the book, but it is hoped it has added proportionately to its value also. To keep down the size however, as far as practicable, references in the citations have often been omitted, especially when the decisions referred to had originally no high authority or have since ceased to have it, or did not support the text cited ; as their retention in such cases would have necessitated a discussion which, though sometimes interesting, could not have much practical value at present. In case of references to important decisions which have been retained, the names of more authoritative or accessible reports have often been substituted for those given in the citations ; but in the table of cited cases references have also been given to the various Reports and series of Reports other than those cited in the body of the work, and names of leading cases printed in Italics. To further increase the usefulness of the work, the index has been made very full.

HUKM CHAND.

Delhi, 1st April 1894.

TABLE OF CONTENTS.

CHAPTER I.

GENERAL VIEW OF THE DOCTRINE.

1. Universal character of the doctrine of *res judicata*.
2. Roman notion of the doctrine.
3. English notion of the doctrine.
4. Mistaken treatment of the doctrine in England as an estoppel.
5. Adoption of the English doctrine in British India.
6. Enactment of the rule of *bar by judgment* in British India.
7. Bar by judgment distinguished from bar by verdict.
8. Principle of *bar by verdict* acted upon by Indian courts on general principles.
9. Difficulties experienced in the application of the Statutory rule on account of the expression *Cause of Action*.
10. The enactment in British India of the rule of *conclusiveness of judgment*.
11. The genesis of the rule.
12. The provision as to *estoppel* against defendants.
13. The constructive extension of the rule by Explanation II.
14. The extension of the rule to Foreign judgments.
15. Amendment as to the matter in issue having been so directly and substantially in the former suit.
16. Amendment as to the jurisdiction of the Court trying the former suit over the subsequent suit.
17. Present Indian rule of *res judicata*.
18. Incomplete character of the present rule.
19. Bar by *res judicata* is absolute, and against all parties.
20. Character of the trial barred by the doctrine
21. Character of the suit of which the trial will be barred.
22. Character of the issue of which the trial will be barred.

CHAPTER II.

MATTERS IN ISSUE AND THEIR IDENTITY.

23. The matter decided need not have been in issue in a instituted suit.
24. Matter must have been in issue in another suit.
25. A matter in issue distinguished from a matter of evidence.
26. A matter in issue distinguished from an issue recorded as such.

27. A matter may be in issue even if neither party bound to plead it.
28. Matter in issue distinguished from the subject-matter the identity of which not required for *res judicata*.
29. Matter in issue distinguished from the object and the relief claimed, the identity of which not required for *res judicata*.
30. Matter in issue distinguished from the form and cause of action, the identity of which not required for *res judicata*.
31. Matter must be substantially and directly in issue in the former suit.
32. Trial of the matter even incidentally cognizable in a subsequent suit will be barred.
33. When a matter is substantially in issue.
34. When a matter is directly in issue.
35. A fact of which the existence is not necessary to a judgment cannot be in issue directly.
36. Constructive extension of the expression matter in issue not a new rule.
37. All the grounds of defence are deemed to be directly in issue.
38. Claims by defendant on separate cause of action need not be urged in defence.
39. Claims not inconsistent with the plaintiff's claim need not be urged in defence.
40. Proper performance of a contract is not matter in issue in a suit on that contract.
41. The same rule applies to undefended suits also.
42. In undefended suits, only matters absolutely necessary for their decision are deemed to be in issue.
43. Amount of credit given by plaintiff to defendant in accounts is not directly in issue in undefended suits for the balance.
44. Only the grounds of the title forming the basis of the claim are matters in issue.
45. Conflict of opinion under the Civil Procedure Code of 1859 as to other titles being matters in issue.
46. Independent titles forming separate causes of action are not under the present Code matters in issue in a suit on any one title.
47. Grounds to be urged in plaintiff's rejoinder are grounds of attack, and therefore matters in issue.
48. Matters are deemed to be in issue, even though not urged and not considered on appeal.
49. Grounds not existing at the time of the former suit are not matters in issue in it.

CHAPTER III.

MATTER IN ISSUE HEARD AND DECIDED.

Decision of a suit on a preliminary point does not bar a subsequent suit on the same cause of action.

TABLE OF CONTENTS.

51. Decision on a preliminary point is *res judicata* as regards that point in a subsequent suit.
52. Any matter, not decided, may be raised in a subsequent suit.
53. Any matter expressly left undecided will not be deemed to have been decided.
54. Same rule applies when the matter left undecided required to be decided for the decision of the suit.
55. Reservation of a matter for decision in a subsequent suit is not binding in the subsequent suit.
56. Decision to be *res judicata* need not have been passed on evidence.
57. Decision in accordance with arbitrators' award may be *res judicata*.
58. Decision on compromise or confession is *res judicata* only in case of dismissal of suit.
59. Decision may be *res judicata* even though not specific and express.
60. Decision on a matter may be *res judicata* even when not embodied in the decree.
61. Admissibility of extrinsic evidence for determining the matters decided in the former suit.
62. Decision to be *res judicata* must be final.
63. *Ex-parte* decision may become final.
64. Appealable decision will be *res judicata* until it is appealed against.
65. Application for retrial does not interfere with the finality of a decision.
66. Decision is final only if it forms the basis of the judgment.
67. Principle of Explanation III is of a general application.
68. Only a relief independently claimed is deemed refused.
69. Subsequent suit will not lie for mesne profits, that were asked for and not allowed, even though they might not have been asked.

CHAPTER IV.

IDENTITY OF PARTIES.

70. Decision in a suit is *res judicata* only between the parties and their privies.
71. Who are parties to a suit.
72. *Benamidars* are parties.
73. A minor may be a party to a suit, so that a decision in it may be *res judicata* against him.
74. An insane may be a party to a suit so that a decision in it may be *res judicata* against him.
75. A party at the time of the decision of the suit is a party.
76. *Pro forma* defendant is a party.

77. Decision on an issue is *res judicata* only against parties between whom the issue had arisen in the former suit.
78. Decision on a matter is *res judicata* even against parties on the same side when there is active controversy between them about it.
79. Identity of parties not affected by change of their relative positions in subsequent suit.
80. Identity of parties not affected by omission from, or addition in, subsequent suit of any person.
81. Persons litigating otherwise than under the same title are not the same parties.
82. Decision in a suit is *res judicata* in regard also to persons becoming privies after the suit.
83. The claim contemplated by the Indian rule is also one based on a title acquired subsequently to the former suit.
84. A decision will not be *res judicata* in a subsequent suit between the co-heirs of one party in the former suit.
85. When one person is said to claim under another.
86. Collateral heirs of a male taking after his widow represent her.
87. A successor in office does not claim under, but represents his predecessor.
88. A son in an undivided Hindu family does not claim under his father.
89. Co-heirs do not claim under each other.
90. Co-owners do not claim under each other.
91. How far executors and administrators represent deceased's heir.
92. A lessee claims under the lessor, but not the lessor under the lessee.
93. Attaching-creditor does not represent the judgment-debtor.
94. Decision against a garnishee is valid against judgment-debtor only to the extent of compulsory payment by the garnishee.
95. Purchaser at execution-sale does not claim under the judgment-debtor, the attaching-creditor or the bailiff conducting the sale.
96. How far stock-holders claim under the corporation.
97. Public corporations represent their members as well as the citizens.
98. Decision binding against persons having similar interest.
99. Explanation V applies also when the decision in the former suit was prior to the Civil Procedure Code.
100. Explanation V applies only when the claim in the former suit *purported* to be on behalf of the others also.
101. Explanation V applies even when permission to sue or defend on behalf of others is not obtained.
102. Explanation V applies when the claims to the right are not on the same title.
103. Master and principal, and servant and agent how far bound by decisions against each other.
104. How far decisions in suits to which the principal debtor or surety is a party will be *res judicata* against surety or principal debtor.

- 105. Principle of bar by notice applies to all the cases of warranty.
- 106. Principle of bar by notice applies to all the cases in which there is a responsibility over.
- 107. The notice given must be express.
- 108. Decision in a suit will bind every person responsible for its consequences.
- 109. Bailor barred by a decision in a suit against a bailee.
- 110. Judgments in *personam* are not *res judicata* in regard to the relation created by them.

CHAPTER V.

ESSENTIAL JURISDICTION.

- 111. General conception of jurisdiction.
- 112. Constituents of jurisdiction.
- 113. Jurisdiction over subject-matter is determined by plaintiff's statement of claim.
- 114. Civil Courts can take cognizance of all suits of a civil nature.
- 115. Suits for mere regulation of ritual or observance of religious honors are not cognizable by Civil Courts.
- 116. Civil Courts can take cognizance of suits relating to rights to property or offices, involving questions of religious rites or ceremonies.
- 117. Civil Courts can take cognizance of a suit by a person entitled to any office for recovery of fees annexed to it.
- 118. Cognizance by Civil Courts of suits involving caste questions.
- 119. Civil Courts can take cognizance of suits relating to marriage.
- 120. Cognizance by ordinary Civil Courts of suits relating to revenue or rent of revenue-paying lands.
- 121. Applicability of the doctrine of *res judicata* to decisions of Revenue Courts.
- 122. Small Cause Courts are Civil Courts of a limited but exclusive jurisdiction.
- 123. Especial jurisdiction of higher grades of Courts over certain suits and civil proceedings.
- 124. Pecuniary limitations of Courts' jurisdiction.
- 125. No minimum limit of pecuniary jurisdiction.
- 126. Pecuniary jurisdiction is determined by *bonâ fide* value given in the plaint.
- 127. Pecuniary jurisdiction is not determined by amount of the demand or transaction from which the claim has arisen.
- 128. Amount proved and decreed does not affect jurisdiction.
- 129. Nature of the defence or of defendant's plea does not affect jurisdiction.
- 130. Plea raising a question of title to immovable property does not affect the jurisdiction of Small Cause Courts in suits for damages to the property.

- 131. Subject-matter of a suit is not necessarily identical with the property to which the suit relates.
- 132. The mortgaged property is not the subject-matter in all the suits on mortgage.
- 133. In suits for a share in the joint property that share is the subject-matter.
- 134. In declaratory suits the property or right in respect of which the declaration is sought is the subject-matter.
- 135. Subject-matter in suits relating to the attachment of property in execution of a decree.
- 136. Valuation of subject-matter for jurisdiction need not be the same with that for the Court Fees Acts.
- 137. Jurisdiction over appeals.
- 138. Jurisdiction over execution proceedings.

CHAPTER VI.

LOCAL AND PERSONAL JURISDICTION.

- 139. Provisions as to local jurisdiction in the Civil Procedure Code 1859, and the High Courts' Charters.
- 140. Conflict of opinion as to the nature of suits relating to immovable property.
- 141. Provisions as to the local jurisdiction in the present Civil Procedure Code.
- 142. Suits relating to immovable property situate outside British India not cognizable by Courts in British India.
- 143. English Courts do not take cognizance of suits for torts to immovable property in foreign country.
- 144. English Courts take cognizance of suits for personal relief arising out of contracts respecting immovable property situate in foreign country.
- 145. Suits for relief relating to immovable property situate outside the local jurisdiction of the Court.
- 146. Determination of jurisdiction over movable property by its *situs*.
- 147. Jurisdiction at the place of accrual of cause of action.
- 148. Conflict of opinion as to *forum contractus*.
- 149. Signification of the words *to dwell* and *to reside*.
- 150. Defendant's voluntary residence at the time of the institution of the suit is sufficient to confer jurisdiction.
- 151. Character of business the carrying of which can confer jurisdiction.
- 152. The carrying on of the business need not be personal.
- 153. Carrying on of business by a foreigner to give jurisdiction must be personal.
- 154. Carrying on of business need not be of a permanent character.
- 155. Carrying on of business need not be in one place exclusively.
- 156. Local limits of jurisdiction over miscellaneous proceedings.

- 157. Court must have jurisdiction over the parties.
- 157A. Courts have no jurisdiction over foreign States and Rulers.
- 157B. Jurisdiction over a State of its own Courts.
- 158. Courts have jurisdiction over all persons subject to, domiciled in, or present at the time of the institution of the suit in the State.
- 159. Courts cannot acquire jurisdiction over foreigners not present in the State by a personal service of summons on them.
- 160. Presence of a non-resident foreigner's property in a country does not give its Courts jurisdiction over him.
- 161. Personal disqualification of presiding Judge.
- 162. Disqualification of a Judge to try a case in which he acted as counsel before the trial.
- 163. A Judge is not disqualified from trying a suit to which his Government is a party.

CHAPTER VII.

EXISTENCE OF JURISDICTION.

- 164. Concurrence of jurisdiction over the suits.
- 165. Competency of jurisdiction does not involve finality of decision.
- 166. Concurrence of jurisdiction required only in regard to subject-matter of suit.
- 167. Judgment by a court without jurisdiction is void.
- 168. Judgment void only so far as it is in excess of jurisdiction.
- 169. Want of jurisdiction against some of the defendants does not avoid the judgment against the other defendants within jurisdiction.
- 170. Jurisdiction over subject-matter must exist throughout the proceedings in the suit.
- 171. Local jurisdiction once acquired is not lost.
- 172. Jurisdiction not divested by death of either party after institution of the suit.
- 173. Consent does not confer jurisdiction.
- 174. Want of non-essential jurisdiction may be waived.
- 175. Estoppel from proving want of jurisdiction in subsequent suit.
- 176. Estoppel against the plea of want of jurisdiction in further proceedings.
- 177. Presumption as to the existence of jurisdiction in regard to the courts of general jurisdiction.
- 178. Presumption in favor of existence of jurisdictional facts.
- 179. Decision on jurisdictional facts cannot be attacked collaterally.
- 180. Conclusive effect of a finding as to service of process.
- 181. Conditions of the institution or cognizance of a suit do not affect jurisdiction.
- 182. Court can have jurisdiction only to decide questions raised by the suit.

- 183. Courts have jurisdiction to grant only the relief awardable in the suit.
- 184. Improper institution of proceedings does not affect competency of court's jurisdiction.
- 185. Appellate court's jurisdiction not affected by defect of jurisdiction of lower court.
- 186. No other provisions relating to procedure affect jurisdiction.
- 187. Irregularities in a process or its service do not avoid judgment.
- 188. Non-compliance with procedure essential for exercise of jurisdiction may be waived.
- 189. Errors in the exercise of jurisdiction do not affect competency of jurisdiction.
- 190. Proceedings at unauthorized time are not void.
- 191. Proceedings at unauthorized place are not void.
- 192. Mere error in a judgment does not render it void.
- 193. Fraud does not render a judgment void.
- 194. Judgment may be set aside for fraud in obtaining jurisdiction.

CHAPTER VIII.

JUDGMENTS *In Rem*.

- 195. Judgments *in rem* are exceptions from the rule as to judgments being *inter-partes*.
- 196. Universally binding effect of judgments *in rem* is based on a notice of proceedings to all persons.
- 197. All the world is supposed to be parties to proceedings *in rem*.
- 198. Usual descriptions of judgments *in rem*.
- 199. Restricted view taken of judgments *in rem* by Indian judges.
- 200. What judgments are usually considered to be *in rem*.
- 201. What judgments were considered to be *in rem* in British India.
- 202. Statutory recognition of judgments *in rem* in British India.
- 203. Effect allowed to judgments *in rem*.
- 204. Jurisdiction in proceedings *in rem*.
- 205. Jurisdiction in proceedings for dissolution of marriage.

CHAPTER IX.

FOREIGN JUDGMENTS.

- 206. Foreign judgments.
- 207. Recognition of foreign judgments due to the notion of comity.
- 208. Supplementing the notion of comity by grounds of public policy and general justice.
- 209. A foreign judgment has as a plea always been considered conclusive in England.

- 210. Ground of distinction between a foreign judgment as a plea and as the basis of an action.
- 211. Distinction involves an absolute inconsistency.
- 212. Entire explosion of the doctrine of the distinction.
- 213. General view of the limitations to the recognition of foreign judgments.
- 214. Foreign judgments to receive recognition must be of courts of competent jurisdiction.
- 215. Foreign court's jurisdiction is primarily determined with reference to the laws of its own country.
- 216. Jurisdiction to receive recognition must be exercised in accordance with general principles of International Law.
- 217. Jurisdiction of French courts over foreigners in suits on contracts made outside France is not recognized.
- 218. Estoppel from plea of want of jurisdiction against foreign judgments.
- 219. Foreign judgments recognized and enforced in British India.
- 220. Courts in Protected Native States are Foreign Courts for the purpose of the rule of *res judicata*.
- 221. Foreign judgment cannot be *res judicata* unless it were so in the country in which it was passed.
- 222. Limitations of the recognition of foreign judgments in British India.
- 223. Provision for enquiry into the merits of judgments of foreign Courts in Asia and Africa.
- 224. A foreign judgment to be a bar must be on the merits.
- 225. Foreign judgment to be a bar in British India must not disclose on its face a mistake of International or Indian Law.
- 226. Even apparent mistakes of International or English Law do not affect the binding force of foreign judgments in England.
- 227. Foreign judgment to be binding must not be contrary to natural justice.
- 228. Term natural justice refers generally to matters of procedure.
- 229. Decision passed without reasonable notice to the persons concerned is contrary to natural justice.
- 230. Foreign judgment to be *res judicata* must not have been obtained by fraud.
- 231. Foreign judgment to be *res judicata* must not sustain a claim founded on a breach of Indian law.
- 232. Recognition of foreign judgments *in rem*.
- 233. Foreign judgments *in rem* are not less binding, if wrong.
- 234. Foreign judgments *in rem* are open to the same objections as those *in personam*.

CHAPTER X.

BAR BY SUIT.

- 235. Principle on which the rule of bar by suit is based.
- 236. Bar by suit distinguished from *res judicata*.

- 237. Rule of bar by suit as enacted in India.
- 238. Bar by suit does not apply to claims not known to plaintiff at the time of the first suit.
- 239. Bar by suit does not apply to a claim beyond the jurisdiction of the court that decided the former suit.
- 240. Bar by suit extends to subsequent suit by a party claiming under or representing a party in the former suit.
- 241. Bar by suit extends to claims by defendant.
- 242. Cause of action and its identity on which the application of bar by suit depends.
- 243. Unity of every *tort* as a *cause of action* for all damages resulting from it.
- 244. Cause of action for several properties misappropriated or wrongfully taken at the same time is the same.
- 245. In suits for damages for injury to several properties their number or distance from each other does not affect the unity of cause of action.
- 246. Essentially distinct injuries caused by the same tort constitute distinct causes of action.
- 247. Subsequent suit will not lie even for damages resulting subsequent to the first suit.
- 248. Suit for mesne profits will bar subsequent suit for those accrued prior to the former suit.
- 249. In suits on title, infringement of the title constitutes the cause of action.
- 250. Suit for a share of certain joint property will bar a suit for other items of that property.
- 251. Identity of cause of action in suits for setting aside alienations.
- 252. Breach of each of several contracts arising from same or similar facts constitutes a distinct cause of action.
- 253. Breach of several contracts made as a part of same transaction or in pursuance of one general contract constitutes only one cause of action.
- 254. Same principle applies to suits for wages due on account of work and labour.
- 255. Breach of each of several covenants in one contract constitutes a distinct cause of action when they are essentially distinct.
- 256. Breach of each of several covenants to be performed at different times constitutes distinct cause of action.
- 257. Suit for breach of contract must include all prospective damages.
- 258. Other instances of identity of cause of action.
- 259. Other instances of non-identity of cause of action.
- 260. Suits for declaration of title to property do not bar a suit for possession of the property.
- 261. Suits for recovering debt and those for enforcement of collateral securities thereof.
- 262. Suit to recover maintenance does not bar a suit to have maintenance charged on property.

TABLE OF CONTENTS.

CHAPTER XI.

LIS PENDENS.

- 263. General character of *lis pendens*.
- 264. The statutory rule in India distinguished from *res judicata*.
- 265. Existence of *prior suit* is essential to the application of *lis pendens*.
- 266. Identity of relief asked is essential for the application of *lis pendens*.
- 267. Identity of *parties* essential to the application of *lis pendens*.
- 268. Pendency of a suit in a *foreign court* will not operate as *lis pendens*.
- 269. Decision in a suit is binding against *pendente lite alienees*.
- 270. *Pendente lite alienees* not to be impleaded in the suit as *parties*.
- 271. Doctrine of *lis pendens* originally based on *constructive notice*.
- 272. Doctrine of *lis pendens* maintained on account of necessity and public policy.
- 273. Recognition and adoption of the doctrine in British India.
- 274. *Lis pendens* applies only to *alienations* made pending a contentious civil proceeding.
- 275. When a *civil suit* may be said to terminate for the purposes of the rule of *lis pendens*.
- 276. Revival of a *suit* after its dismissal for retrial is a continuation of it.
- 277. *Lis pendens* continues during the pendency of the appeal.
- 278. Proceedings on a *bill of review* are not a continuation of the suit or of its *lis pendens*.
- 279. *Lis pendens* applies only to alienations made during *bonâ fide* and diligent continuous prosecution of the suit.
- 280. *Lis pendens* does not affect rights acquired before the commencement of the suit.
- 281. *Lis pendens* applies to every sort of alienation including a sale in execution of a decree.
- 282. *Lis pendens* applies only to the alienation of the rights of either of the parties.
- 283. *Lis pendens* applies also to *personal property* except negotiable paper, not due.
- 284. *Lis pendens* applies only to property specifically sued for.
- 285. Character of the description of the property to be affected by *lis pendens*.
- 286. *Lis pendens* attaches only to proceedings in *domestic courts*.
- 287. Statutory systems of registration of *lis pendens*.

CHAPTER XII.

A.—BAR FOR JOINTNESS.

- 288. Principle of bar for jointness.
- 289. Basis of the principle.

- 290. Bar for jointness applies to joint contracts in England.
- 291. Bar for jointness applies to joint contracts in the United States.
- 292. Exceptions to the rule of bar for jointness in its application to contracts.
- 293. Bar for jointness applies to joint contracts in British India.
- 294. Bar for jointness applies to joint tort-feasors in England and India.
- 295. Bar for jointness does not apply in case of torts in the United States.

B.—BAR IN THE SAME SUIT.

- 296. An order passed in execution proceedings is binding on parties in all subsequent stages of the proceedings.
- 297. An order passed on appeal is binding on the parties in all the subsequent stages of the suit.

TABLE OF CASES.

A

Abbott v. Coburn, 67 Am. Dec. 735 ; 28 Vt. 663	...	...	...	...	...	...	...	...	626
Abbott v. Stevens, 117 Mass. 340	...	...	...	...	...	...	...	...	87
Abboy v. Annamalai, I.L.R., XII Mad., 180	...	...	...	...	...	...	...	689,	694
Abdoolah Khan v. Sree Kunto Pershad, XV W. R., 252	...	...	...	...	...	...	...	...	39
Abdul Kadir v. Salima, I.L.R., VIII All., 149...	...	...	...	...	...	...	...	...	267
Abdul Majid v. Jew Narain, I.L.R., XVI Cal., 233	...	...	...	...	...	...	...	...	25
Abdul Wahab v. M. Hingu, V Beng. S. D. A. Rep. 200	...	...	...	...	...	...	...	...	266
Abell v. Simon, 49 Md. 318	...	...	...	...	...	...	...	...	202
Abidunnissa v. Amirunnissa, L. R., IV I. A., 66 ; I. L. R., II Cal., 327	...	...	...	...	...	...	...	...	26
Ableman v. Booth, 21 How. 506	...	...	...	...	...	...	...	...	374
Abney Lone & Co. v. Whitted, 28 La. Ann 818	...	...	...	...	...	...	...	293, 296(Ad.)	...
Abouloff v. Oppenheimer, 10 Q. B. D., 295	...	...	...	...	...	...	...	...	596
Abram v. State, 20 S. W. R. 987	...	...	...	...	...	...	...	...	388
Acer v. Hotchkiss, 97 N. Y. 395	...	...	...	...	...	...	...	...	526
Ackley v. Westervelt, 86 N. Y. 418...	...	...	...	...	...	...	...	...	77
Adair v. New River Co., 11 Ves. 429	...	...	...	...	...	...	...	...	211
Adams v. Adams, 51 N. H. 388	...	...	...	...	...	...	...	...	596
Adams v. Adams, 25 Minn. 72	...	...	...	...	...	...	...	...	84
Adams v. Barnes, 17 Mass. 365	...	...	...	...	...	...	...	...	4
Adams v. Bradley, 5 Sawy. (U. S.) 217	...	...	...	...	...	...	...	...	372j
Adams v. Broughton, 2 Str. 1078, Andr. 18	...	...	...	...	...	...	...	...	752
Adams v. Cowles, 6 Am. St. Rep. 74 ; 95 Mo. 501	...	...	...	...	...	...	...	...	446
Adams v. Gardner, 13 B. Mon. 197	...	...	...	...	...	...	...	677(Ad.)	...
Adams v. G. West R. Co., 6 H. & N. 404	...	...	...	...	...	...	...	...	349
Adm'r v. Clarendon, 18 Vt. 253	...	...	...	...	...	...	...	...	636
Ador, <i>Ex parte</i> . [1891] 2 Q. B. 574	...	...	...	...	...	...	...	...	46
Advocate General of Bombay v. David Haim, I.L.R., XI Bom., 185	...	...	...	...	...	...	...	...	265.
Aghornath Rai v. Radhika Prasad Casee. XIV W. R., 339	...	...	...	...	...	...	...	...	238
Agnew v. Adams, 26 S. C. 101	...	...	...	...	...	...	...	...	398
Agnew v. Mc Elroy, 48 Am. Dec. 772 ; 10 Sm. & Mar. 552	...	...	...	...	...	...	...	...	52
Ahl v. Ahl, 60 Md. 207	...	...	...	...	...	...	...	...	661
Ahmad Khan v. Mehrkhan, 1893 P. R., No. 35	...	...	...	...	...	...	...	...	618
Ahmedbhoy v. Vulleebhoy, I.L.R., VI Bom., 703	...	...	...	...	...	...	...	23, 189,	486
Ahmen, <i>Ex parte</i> , 11 Am. St. Rep. 263 ; 77 Cal. 198	...	...	...	...	...	...	...	...	466
Ain Ally v. Juggut Chunder, XXV W. R., 416	...	...	...	...	...	...	...	...	171
Ajoodhia Lall v. Gumani Lall, II C.L.R., 134	...	...	...	...	...	...	...	...	307
Alabama and Vicksburg Ry. Co. v. Bolding, 30 Am. St. Rep. 544 ; 69 Miss. 255	...	...	...	...	...	...	...	...	466
Alagirisami v. Innasi, I.L.R., III Mad., 127	...	...	...	...	...	...	...	...	296
Aldrich v. Kinney, 10 Am. Dec. 151 ; 4 Conn. 380	...	...	...	...	...	...	...	...	560
Alexander v. Jones, L.R. I Ex. 133	...	...	...	...	...	...	...	...	351
Ali Baksh v. Samirudin, IV B. L. R., A. C., 31 ; XII W. R., 477	...	...	...	...	...	...	...	...	238
Ali Shah v. Husain Bakhsh, I.L.R., I All., 588	...	...	...	...	...	...	...	...	713
Alison's Case, 9 Oh. Ap. 25	...	...	...	...	...	...	...	...	129
Alivon v. Furnival, 1 C. M. & R. 277 ; 3 L. J. Ex. 241	...	...	...	...	...	...	...	...	583
Alkal Bapulli v. Kunhalli, V L. J., 408	...	...	...	...	...	...	...	...	92
Allen v. Case, 13 Wis. 621	...	...	...	...	...	...	...	...	695
Allen v. De Groodt, 14 Am. St. Rep. 626 ; 98 Mo. 159...	...	...	...	...	...	...	...	...	192
Allen v. Godfrey, 44 N. Y. 433	...	...	...	...	...	...	...	...	479
Allen v. Huntington, 16 Am. Dec. 702 ; 2 Aikens, 249	...	...	...	...	...	...	...	...	464
Allen v. Morris, 34 N. J. L. 159	...	...	...	...	...	...	...	...	715

	PAGE
Allen v. Newsberry , 8 Iowa, 65	62
Allen v. Reilly , 5 Nev. 452	
Allen v. Salinger , 103 N. Car. 14	
Alley v. Caspari , 6 Am. St. Rep. 178; 80 Me. 234	
Allhusen v. Margarejo , 3 Q. B. 340	344
Allie v. Schmitz , 17 Wis. 169	457
Allison v. Taylor , 32 Am. Dec. 68, 6 Dana. 87	167
Allman v. Taylor , 101 Ill. 185	166(<i>Id.</i>)
Allunni v. Kunju Sha , I.L.R., VII Mad., 264	101, 104
Almond v. Almond , 15 Am. Dec. 781; 4 Rand. 662	724, 726
Almy v. Daniels , 15 R. I. 312	40
Alves v. Bunbury , 4 Camp. 28	542
Alwood v. Mansfield , 59 Ill. 508	715(<i>Id.</i>)
Amanat Bibi v. Indad Husain , L. R., XV I. A., 106; I.L.R., XV Cal., 800	618, 646
Ambler v. Leach , 15 W. Va. 677	466
Ambler v. Whipple , 32 Am. St. Rep. 202; 139 Ill. 511	486
Ambu v. Kettilamma , I.L.R., XIV Mad., 23	619, 669
Ames Iron Works v. Warren , 76 Ind. 512	342
Ames v. Boland , 1 Minn. 365	461(<i>Id.</i>)
Ames v. Winsor , 19 Pick. 247	414
Ameena v. Kuttoo Khan , VII Beng. S. D. A. Rep. 27	266
Amir Singh v. Naimati Prasad , I.L.R., IX All., 388	276
Amirtolal v. Rajoneekant , L. R., II I. A., 113, XV B. L. R., 10	191(<i>Id.</i>)
Amir Zama v. Nathu Mal , I.L.R., VIII All., 396	39
Ammallu Ammal v. Subbu Vadiyar , II M.H.C.R., 184	296
Ananta Balacharya v. Damodhar , I.L.R., XIII Bom., 25	45
Andale v. The Secretary of State for India , III M.L.J., 242	306
Anderson, Ex parte 5 Ch. App. 473	472
Anderson v. Binford , 11 Heisk. 310; 58 Tenn. 310	432
Anderson v. Claman , 24 N.E.R. 175	478
Anderson v. Coburn , 27 Wis. 558	468
Anderson v. Commissioners , 12 Ohio, 635... ..	441
Anderson v. Haddon , 33 Hun. 435	586
Anderson v. Henzey , 7 W. N. Pa. 39	287(<i>Id.</i>)
Anderson v. Kalagarla , I.L.R., XII Cal., 339	654, 658, 663
Anderson v. Wilson , 100 Ind. 408	688(<i>Id.</i>)
Anderson v. Young , 21 Pa. St. 443	202
Andi v. Thatha , I.L.R., X Mad., 347	618
Andrews v. Davison , 43 Am. Dec. 606, 17 N. H. 413	228
Andrews v. Denison , 16 N. H. 469... ..	228
Andrews v. Linton , 2 Ld. Raym. 884	413
Andrews v. Smith , 19 Blatchf. 100., 5 Fed. Rep. 833	520
Andrews v. Varrell , 46 N. H. 17	87
Andrews v. Wheaton , 23 Conn. 112	414(<i>Id.</i>)
Anrudh Singh v. Sheo Prasad , I.L.R., IV All., 481	61
Antelope , 10 Wheat. 123	600
Anthony v. Kasey , 83 Va. 338	238 <i>b</i>
Antony v. Greenhew , 107 U. S. 769	372 <i>j</i>
Anund Mohan v. Indro Monee , XVI W.R., 214... ..	29
Anundo Moyee Dossee v. Dhonendro Chunder , XIV M.I.A., 101, VIII B.L.R., 122; XVI W. R., P. C. 19	204
Anusuyabai v. Sakharam , I.L.R., VII Bom., 464	148
Apel v. Kelsey , 20 Am. St. Rep. 183; 52 Ark. 341	427
Appasami v. Ramasami , I.L.R., IX Mad., 279	12, 662
Appasami Poulle v. Parry , V I. J. 189	567, 569
Archakam Srinivasa Dikshatulu v. Udayagiry Anantha Charlu , IV M. H. C. R., 349	250
Archer v. Preston , I Vern 75, 1 Eq. Ca. Ab. 133	321, 334
Ardaseer Cursetjee v. Perozeboye , VI M. I. A., 390; IV W.R., P. C. 91	266
Argall v. Pitts , 78 N. Y. 239	84(<i>Id.</i>)
Arglasse v. Muschamp , 1 Vern. 135... ..	334
Armroyd v. Williams , 2 Wash. C. C. 508	607
Armstrong v. Barton , 42 Miss. 506... ..	453
Arndt v. Griggs , 134 U. S. 316	594
Arnold v. Kyle , 8 Baxt. 319	72

TABLE OF CASES.

3

Arnold v. Sinclair, 28 Am. St. Rep. 489 ; 11 Mon. 556...	...	...	...	...	139
Arnold v. Smith, 80 Ind. 422 ...	...	...	...	...	715(Ad.)
Arnott v. Redfern, 3 Bing. 353 ...	...	...	...	...	549
Arunachala v. Panchanadam, I.L.R., VIII Mad., 348 ...	...	...	...	...	124, 191
Arunmoyi Dasi v. Mohendra Nath, I.L.R., XX Cal., 894 ...	...	...	...	...	513
Asbury v. Odell, 83 Mo. 264...	...	...	...	...	402
Ashbury v. Ellis, 1893 Ap. Ca. 339 ...	...	...	...	...	363
Ashley v. Cunningham, 16 Ark 168 ..	...	...	...	...	704
Ashton v. City of Rochester, 28 Am. St. Rep. 619 ; 133 N. Y. 187 ...	...	...	...	...	158, 208, 233
Ashuelot Bank v. Pearson, 14 Gray, 521 ..	...	...	...	...	293
Atkyns v. Smith, 2 Atk. 63 ...	...	...	...	...	525
Attorney General v. Chicago R. Co., 112 Ill. 520 ..	...	...	...	...	37
Attorney General v. Welsh, 4 Hare, 572 ..	...	...	...	...	249
Aughore Nath v. Roop Chand, XIII W. R., 97 ...	...	...	...	...	91
Aukhil Chunder v. Mohiny Mohun Dass, I.L.R., V Cal., 489 ; IV C.L.R., 491 ...	...	...	...	...	310, 409
Aukhil Chunder v. Shib Narain, XV W. R., 527 ...	...	...	...	...	150
Auld v. Smith, 23 Kans. 65 ..	...	...	...	...	150
Aultman v. Stout, 15 Neb. 586 ...	...	...	...	...	623
Aunjona Dasi v. Prahlad Chandra, VI B.L.R., 243 ; XIV W. R., 132, 403 ...	...	...	...	...	267
Aurora City v. West, 7 Wall. 82 ..	...	...	...	...	64(Ad.)
Avala v. Kuppu, I.L.R., VIII Mad., 77 ..	...	...	...	...	121
Averill v. Loucks, 6 Barb. 19 ...	...	...	...	...	744
Averill v. Steamer Hartford, 2 Cal. 308 ...	...	...	...	...	517(Ad.)
Avery v. Fitch, 4 Conn. 362 ..	...	...	...	...	655
Avery v. Slach, 17 Wend. 85 ...	...	...	...	...	415
Axford v. Graham, 57 Mich. 422 ...	...	...	...	...	234
Axman v. Ducker, 25 Pac. R. 582, 40 Kans. 179, 26 Pac. R. 946, 40 Kans. 715...	...	...	...	...	449
Ayers, <i>Id.</i> , 123 U. S. 445 ...	...	...	...	...	372)
Ayers v. Ashmead, 83 Am. Dec. 454, 31 Conn. 447 ..	...	...	...	...	758
Azmat Ali v. Harman, 1875 P. R. No. 61, X P. R. 157 ...	...	...	...	...	45

B

Bababhat v. Narharbhat, I.L.R. XIII Bom., 224 ...	...	...	...	...	396
Babaji v. Dinkar, 1873 Bom. P. J., No. 91 ..	...	...	...	...	297
Babaji v. Rajaram, I.L.R., I Bom., 75 ...	...	...	...	...	150
Babaji Pandurang v. Dhondo Vithal, 1886 Bom. P. J., 32 ...	...	...	...	...	393
Babeock v. Camp, 12 Ohio, 11 ...	...	...	...	...	49
Babu Lal v. Ishri Prasad, I.L.R., II All. 582 ...	...	...	...	...	15, 119
Badeley v. Consolidated Bank, 31 Ch. D. 536 ...	...	...	...	...	746
Badger v. Titcomb, 26 Am. Dec. 611 ; 15 Pick. 409 ...	...	...	...	...	653, 659
Bago v. Diwan, 1884 P.R., No. 25 Civil ...	...	...	...	...	117
Bahadur v. Nawab Jan, I.L.R., III All., 822 ...	...	...	...	...	294, 303
Bailey v. McGinness, 57 Mo. 362 ...	...	...	...	...	166, 402
Bailey v. Martin, 119 Ind. 102 ...	...	...	...	...	622(Ad.)
Bailey v. McGregor, 46 Iowa, 667 ...	...	...	...	...	715(Ad.)
Bailey v. Sloan, 65 Cal. 387 ..	...	...	...	...	315
Bai Mahkor v. Bulakhi Chaku, I.L.R., I Bom., 538 ..	...	...	...	...	305, 310
Baker v. Baker, 75 Am. Dec. 243 ; 4 Dutcher, 13 ; 28 N. J. L. 13 ...	...	...	...	...	613, 620
Baker v. Chapline, 12 Iowa, 204 ...	...	...	...	...	444(Ad.)
Baker v. Stinchfield, 57 Mo. 363 ...	...	...	...	...	50, 72, 153
Baker v. Stonobroker, 34 Mo. 172 ...	...	...	...	...	432, 436
Bakshi v. Nizamuddin, I.L.R., XX Cal., 505 ..	...	...	...	...	116
Bakshiram v. Darku, X B. H. C. R., 369 ...	...	...	...	...	152
Bhikaji v. Khushalji, XI B. H. C. R., 24 ...	...	...	...	...	693
Baloji Tamaji v. Tamangoud, VI B. H. C. R., 97 ...	...	...	...	...	657
Baldeo Sahai v. Bateshar Singh, I.L.R., I All., 75 ...	...	...	...	...	67
Baldwin v. Calkins, 10 Wend. 167 ..	...	...	...	...	414
Balkishan v. Kishan Lal, I.L.R., XI All., 145 ...	...	...	...	...	23, 25, 33, 46, 145, 675
Ball v. Tompkins, 41 Fed. Rep. 486 ...	...	...	...	...	520
Ballah Mal v. Bhupa Mal, 1888 P. R., No. 110 ...	...	...	...	...	304
Ballantine v. Golding, Cooke B. L. 155 ..	...	...	...	...	604

Baltimore & O. R. R. Co. v. Gallahues Adm'r, 65 Am. Dec. 254 ; 12 Gratt. 655	...	368
Baltimore R. R. Co. v. North, 103 Ind. 486	...	398(Ad.)
Baltzell v. Nosler, 63 Am. Dec. 466 ; 1 Iowa. 588	...	560
Baltzer v. State, 104 N. Car. 265	...	372j
Balum Bhutt v. Bhoobunlal, VI W. R. 78	...	164
Balvant v. Babaji, I. L. R. VIII Bom., 602	...	752
Balwant v. Bhikaji, 1873 Bom. P. J. No. 86	...	297
Bancroft v. Winspear, 44 Barb. 209	...	613
Banda v. Abadi, I.L.R., IV All., 180	...	621
Bandey Karim v. Romesh Chunder, I.L.R., IX Cal., 65	...	760
Bank v. Roseberry, 81 Pa. St. 309	...	205
Bank of Australasia v. Harding, 9 C.B. 661 ; 19 L. J. C. P., 345	...	372w, 550
Bank of Australasia v. Nias, 16 Ad. & El., N. S. 717 ; 20 L. J. Q. B., 284	206, 540, 555, 582, 584, 594	
Bank of Beloit v. Beale, 34 N. Y. 473	...	52b
Bank of Bengal v. The East India Company, Bignell Rep. 120	...	372p
Bank of Commonwealth v. Hopkins, 2 Dana, 395	...	126
Bank of North America v. Wheeler, 73 Am. Dec. 683 ; 28 Conn. 433	...	87
Bank of United States v. Merchants' Bank, 7 Gill, 415...	...	34
Bannon v. People, 1 Brad. App. 496	...	441
Bapalal v. Bai Amrat, 1875 Bom. P. J., 247	...	268
Bapuji v. Kuvarji, I.L.R., XV Bom., 400	...	297
Barber v. Morris, 5 Am. St. Rep. 836 ; 37 Minn. 194	...	468
Bardwell v. Collins, 20 Am. St. Rep. 547 ; 44 Minn. 97	...	592
Barfield v. Jefferson, 84 Ga. 609	...	210
Barger v. Buckland, 28 Gratt. 862...	...	339
Barger v. Hobbs, 67 Ill. 592	...	56 (Ad.)
Barker v. Cleveland, 19 Mich. 230...	...	73, 177(Ad.)
Barley v. Bryant, 1 Ell. and Bl. 340	...	349
Barnett v. Brandas, 6 M. & G. 640	...	752
Barney v. Dewey, 7 Am. Dec. 372 ; 13 Johns. 224	...	233
Barlow v. Stanford, 82 Ill. 298	...	703
Barney v. Douglas, 19 Vt. 98	...	603
Barrel v. Benjamin, 15 Mass. 354	...	372u
Barrett v. Garney, 33 Cal. 530	...	526
Barrows v. Kindred, 4 Wall. 403	...	88(Ad.)
Barrs v. Jackson, 1 Y. & C. C. C. 585 ; S. C. On Appeal. 1 Phil. 582	...	37, 44, 65
Barry v. Carothers, 6 Rich. 331	...	158
Bartells v. Schell, 16 Fed. Rep. 341	...	623
Bartero v. Real E. S. B., 10 Mo. App. 76	...	185
Barth v. Burt, 43 Barb. 628	...	73, 625
Bartlet v. Knight, 2 Am. Dec. 36 ; 1 Mass. 401	...	608
Bartlett v. Boston Gas Light Co., 122 Mass. 209	...	200(Ad.)
Barton v. Anderson, 104 Ind. 578	...	84(Ad.)
Barton v. Barbour, 104 U. S. 126	...	517
Barwell v. Knight, 51 Barb. 267	...	64
Bascom v. Manning, 52 N. H. 132...	...	85
Bass v. Sevier, 58 Tex. 567	...	196(Ad.)
Bassett v. Crafts, 129 Mass. 513	...	483
Bassick Mining Co. v. Schoolfield, 10 Col. 46	...	451
Basten v. Butter, 7 East. 479	...	625
Bates v. The Republic, 2 Tex. 616	...	372c
Bates v. Spooner, 45 Ind. 489	...	64
Bates v. Stanton, 1 Duer. 79	...	235
Bateshar Nath v. Faizul Hasan, I.L.R., V All. 380	...	477
Batterman v. Pierce, 3 Hill, 171	...	625
Battle v. Thompson, 65 N. Car. 406	...	...
Battorff v. Wise, 53 Ind. 35	...	135, 334
Bauser v. Eilers, 11 Wis. 277	...	531(Ad.)
Bayley v. Buckland, 1 Ex. 1	...	437
Baylor v. Dejarnette, 13 Gratt. 152	...	192(Ad.)
Bazayet Hossein v. Dooli Chund, I.L.R., IV Cal., 402...	...	697
Beach v. Crain, 49 Am. Dec. 369 ; 2 N. Y. 86	...	661, 664
Beach v. Norton, 8 Conn. 71...	...	677(Ad.)
Beall v. Brown, 12 Md. 550...	...	625

TABLE OF CASES.

5

	PAGE
Beall v. Siquessfield, 73 Ga., 48	386(Ad.)
Beals v. Illinois M. & T. Ry. Co., 133 U. S. 290	163
Bean v. Quimby, 5 N. H. 94	387(Ad.)
Becharam v. Thakoormonee, VIII B. L. R., 54 (n) ; X W. R., 114	259
Becharji v. Pujaji, I.L.R., XIV Bom., 31	99, 103, 120
Beck v. Devereaux, 9 Neb. 109	652
Becquet v. MacCarthy, 2 B. & Ad. 951	555, 584, 591
Bedell v. Bailey, 58 N. H. 62	384
Bedwell v. Jones, 9 Lea. 168	287(Ad.)
Beers v. Arkansas, 20 How. 529	372d
Beharee Lal v. Baboo, II Ag., 80	258
Behary Lal v. Juggo Mohun, I.L.R., IV Cal., 1	514
Behymer v. Nordloh, 12 Col. 352	433
Belden v. State, 103 N. Y. 1	130
Bell v. Antwerp, London and Brazil Line. (1891) 1 Q. B. 108	345
Bell v. Donohue, 47 N. Y. Sup. 458	682
Bell v. Morrifield, 4 Am. St. Rep. 436 ; 109 N. Y. 202	12(Ad.)
Bellamy v. Sabine, 1 De. G. & J. 566	683, 684b, 691
Belleairn, 10 P. D. 161	126
Bellinger v. Craigue, 31 Barb. 534	77, 78
Beltzhoover v. Commonwealth, 1 Watts, 126	736
Bemola Soondury v. Panchanun, I.L.R., III Cal., 705	60, 99, 177
Bendernagle v. Cocks, 32 Am. Dec. 448 ; 19 Wend, 207	636, 651, 654, 655, 661
Benedict v. National Bank of the Commonwealth, 4 Daly. 171	52b
Beni Ram v. Nanhu Mal. L. R., XI I. A., 181 ; I.L.R., VII All., 102	760
Benjamin v. Elmira, 49 Barb. 448	182(Ad.)
Bennett v. Child, 88 Am. Dec. 692 ; 19 Wis. 362	465
Bennett, ex parte, 44 Cal. 84	238b
Bennett v. Couchman, 48 Barb. 73	200(Ad.)
Bennett v. Graham, 71 Ga. 211	226c
Bennett v. Hotchkiss, 20 Minn. 168	715(Ad.)
Bennett v. Potter, 2 C. & J. 622	479
Bennett v. Hethington, 16 S. & R. 190	196(Ad.)
Bennets' Lessee v. Williams, 5 Ohio, 461	195
Bensimer v. Fell, 29 Am. St. Rep. 774 ; 35 W. V. 15	185
Benton v. Benton, 90 N. Car. 559	56(Ad.)
Benwell v. Black, 3 T. R. 643	144
Bepin Behari v. Brojo Nath, I.L.R., VIII Cal., 357	407
Bernard v. Hoboken, 3 Dutch, 412	32
Bernardi v. Motteaux, 2 Doug. 574	513
Berry v. King, 15 Or. 165	483
Beronio v. Southern Pac. R. R. Co., 21 Am. St. Rep. 57 ; 86 Cal. 415	632
Bessessur v. Murli, I. L. R., IX Cal., 163	112
Beswick v. Capper, 7 C. B. 669 ; 18 L. J. C. P. 216	291
Bethel v. Bethel, 92 Ind. 313	237
Betterton v. Roope, 3 Lea, 215	67a
Betts v. Stair, 5 Conn. 533	50
Bever v. North, 8 N. E. R. 576 ; 107 Ind. 554	228
Beverley v. Burke, 54 Am. Dec. 351 ; 9 Ga. 440	397
Bhag Mal v. Mhora, 1888 P. R., No. 169	294
Bhag Vantrai v. Mehta Ajurao, I.L.R., XVIII Bom., 40	
Bhagwan Singh v. Secretary of State for India in Council, L. R. 11 I. A. 38	
Bhagwant Singh v. Tej Kuar, I.L.R., VIII All., 91	171
Bhao Singh v. Het Ram, VII All. H. C. R., 17	151
Bhavani Shankar v. Pursadri, I.L.R., VI Bom., 292	280, 572
Bheeka Lal v. Bhuggoo Lal, I.L.R., III Cal., 23	92, 97
Bhinuk v. Collector of Jounpur, II Ag. 271	261
Bhikam Bhat v. Joseph Fernandez, I.L.R., V Bom., 673	27
Bhisto Shankar v. Ram Chandra Rav, VIII B. H. C. R., 1. C. 89	90
Bholabhai v. Adesang, I.L.R., IX Bom., 75	23, 392
Bhugirath v. Ram Lochun, I.L.R., VIII Cal., 275	143
Bhukhandas v. Lallubhai, I.L.R., XVII Bom., 562	112, 748
Bickett v. Morris, L. R. 1 H. L. Sc. 47	469
Bigelow v. Bigelow, 19 Am. Dec. 591 ; 4 Ohio, 134	527
Bigelow v. Winsor, 1 Gray. 299	55

	PAGE
Bigley v. Jones , 114 Pa. St. 510 ...	...
Bikrama Singh v. Bir Singh , 1888 P. R., No. 191 ...	346, 373, 389, 396, 541, 545, 553, 561, 565, 570, 573, 579, 581, 591
Bilsand v. McManomy , 82 Ind. 139 ..	12
Bimeler v. Dawson , 39 Am. Dec. 430 ; 4 Scam. 536 ...	547
Bipradas Dey v. Secretary of State for India in Council , I.L.R., XIV Cal.. 262 (n).	356
Birchunder v. Hurrish Chunder , I.L.R., III Cal.. 383 ; I C.L.R., 585 ...	83, 143
Bird v. Randall , 3 Burr. 1345 ...	734, 754
Bird v. Smith , 56 Am. Dec. 635 ; 34 Me. 63 ...	72 (Ad.)
Birdsall v. Fuller , 11 Hun. 204 ...	386
Birkhead v. Brown , 5 Sandf. 134 ...	50, 52d
Birnkerhoff v. Brown , 4 Johns. Ch. 671 ...	719
Bischoff v. Wethered , 9 Wall. 812 ..	374, 376
Bishop of Winchester v. Paine , 11 Ves. 195 , 8 R. R. 131 ...	684, 711
Bisram Mahton v. Sahib-un-nissa , I.L.R., III All., 333 ...	479
Bishop v. Nelson , 93 Ill. 601 ...	414 (Ad.)
Bissell v. Briggs , 6 Am. Dec. 88 ; 9 Mass. 462 ...	378, 45 (Ad) 557
Bissell v. Kellog , 60 Barb. 617 ...	37, 512
Bisseshur Mullick v. Mahatab Chunder , X W. R., P. B., 8 ...	760
Bissessur Lall v. Luchmessur Singh , L.R., VI L. A., 233; V. C. L. R., 477 ...	211, 215
Bissessur Singh v. Gunput Singh , VIII C. L. R., 113 ...	678
Bissonath Neogi v. Hara Gobind Neogi , V. W. R., 27 ...	238
Bissorup v. Gorachand , I.L.R., IX Cal.. 120 ...	174
Bkoolwa v. Omar Ali , 1859 N. S. D. D., 127 ...	260
Blackburn v. Crawford , 3 Wall. 175 ...	179
Blackburn v. Watson , 85 Pa. St. 241 ...	678 (Ad.)
Blackwood v. Brown , 32 Mich. 104 ...	233
Blain, ex parte , 12 Ch. D. 522 ...	362, 563
Blair v. Bartlett , 31 Am. Rep. 455 ; 75 N. Y. 150 ...	77
Blair v. Cummings , 39 Cal. 667 ...	...
Blake v. Douglass , 27 Ind. 416 ...	...
Blake v. Hayward , 1 Bailey's Eq. 208 ...	69
Blake v. Smith , 8 Sim. 303 ...	59
Blakemore v. Canal Co. , 2 Crompt. M. & R. 133 ...	17
Blakey v. Newby , 6 Munf. 64 ...	18
Blanchard v. Russell , 7 Am. Dec. 106 ; 13 Mass. 1 ...	...
Blanchard v. Ware , 43 Iowa 530 ...	691
Blanchard v. Webster , 62 N. H. 167 ...	486, 492
Blanken Baker v. Bank , 85 Ind. 459 ...	85
Blann v. Crocheron , 54 Am. Dec. 203 , 19 Alabama. 647 ...	757
Blanton v. Carroll , 84 Va. 539 ; 10 S. E. R. 329 ...	398, 465
Bledsoe v. State , 64 N. Car. 392 ...	372i
Block v. Pontenot , 35 La. Ann. 965 ...	293
Block v. Henderson , 14 Am. St. Rep. 138 , 8 S. E. R. 877 , 82 Ga. 23 ...	411, 481
Blodgett v. Dow , 81 Maine. 197 ...	125, 197
Blodgett v. Schaffer , 94 Mo. 652 ...	444
Blood v. Bates , 31 Vt. 147 ...	479
Bloodgood v. Grasey , 31 Ala. 575 ...	29a, 48
Bloom v. Burdick , 37 Am. Dec. 299 ; 1 Hill. 130 ...	440
Bloomer v. Sturges , 58 N. Y. 168 ...	...64 (Ad.)
Bloss v. Plymale , 100 Am. Dec. 752 ; 3 W. V. 393 ...	753
Blum v. Chesseman , 51 N. W. R. 666 ...	465
Board v. M. P. R. R. Co. , 24 Wis. 124 ...	56
Board of Commr's. v. Markle , 46 Ind. 96 ...	442 (Ad.)
Board of Liquidation v. McComb , 92 U. S. 531 ...	372d
Board of Public Works v. Gaunt , 76 Va. 455 ...	372j
Bobb v. Graham , 89 Mo. 200 ...	68 (Ad.)
Bobos Heir v. Stickney , 36 Ala. 482 ...	72
Bodurtha v. Phelan , 13 Gray. 413 ...	85
Bohu v. Devlin , 28 Mo. 319 ...	414 (Ad)
Boileau v. Rutlin , 2 Exch. 665 ...	38, 85
Boistub Churn v. Trahee Ram , XV W. R., 32 ...	277
Bokers v. Chapline , 12 Iowa. 204 ...	427 (Ad.)
Bolakce Lall v. Pertam Singh , I.L.R., V Cal.. 928 ...	400
Bolgiano v. Cooke , 19 Md. 375 ...	242

TABLE OF CASES.

	PAGE
Boloram v. Kameenee Dossee , IV W. R., 108., C. R.	570, 571
Bolton v. Brewster , 32 Barb. 389	442
Bolton v. Gladstone , 5 East, 155 ; 1 Smith, 372 ; VII R. R. 674 ...	512
Bolton v. Jacks , 6 Rob. (N. Y.) 198	447
Bond v. Bond , 2 Sw. & Tr. 93	528
Bond v. T. & P. R. W. Co. , 46 Tex. 328	718
Bond v. Marx , 53 Ala. 177	
Bonesteel v. Todd , 80 Am. Dec. 90 ; 9 Mich. 371	737, 743
Bonnell v. Holt , 89 Ill. 71	
Bonomalee Nag v. Koylash Chunder , I.L.R., IV Cal., 692	187
Bonomally v. Campbell , X B. L. R., 193 ; XXI W. R., 20	288
Bouomi v. Blackhouse , 9 H. L. Cas. 503	
Bonsey v. Wordsworth , 25 L. J. N. S. C. P. 205	
Bonvillain v. Bourg , 16 La. Ann. 363	
Booth v. Clark , 17 How. 322	338
Borden v. Houston , 2 Tex. 594	
Borden v. State , 54 Am. Dec. 217 ; 11 Ark. 519	
Borngesser v. Harrison , 78 Am. Dec. 757 ; 12 Wis. 511	652
Bors v. Preston , 111 U. S. 256	372 <i>u</i>
Borzeman v. Singer Mfg. Co. , 70 Ga. 685	181
Boson v. Sanford , 2 Salk. 440	741
Boston, &c., W. R. R. Co. v. Sparhawk , 79 Am. Dec. 750 ; 1 Allen, 448	476, 488
Boswell v. Tunnell , 10 Ala. 958	
Botsford v. O'Conner , 57 Ill. 73	444
Bouchaud v. Dias , 3 Denio. 238	49, 52 <i>c</i>
Boucher v. Lawson , Cas. temp. Hard. 89	539
Bouchier v. Taylor , 4 Bro. P. C. 585	37
Bouldin v. Ewart , 63 Mo. 330	481
Bounger v. Atkins , Skin. 15	194
Bowen v. Hastings , 2 N. W. R. 301 ; 47 Wis. 232	743
Bowers v. Chaney , 21 Tex. 363	397
Bowler v. Huston , 32 Am. Rep. 673 ; 30 Gratt. 266	401
Bowles v. Orr , 1 Y. Coll. 464	594, 597
Bowlus v. Brier , 87 Ind. 391	
Bowman's Case , 67 Mo. 146	384
Boyd v. Alabama , 94 U. S. 645	32
Boyd v. Blankman , 87 Am. Dec. 146 ; 29 Cal. 19	492
Boyd v. Caldwell , 1 Rich. 117	226 <i>d</i>
Boyd v. Roane , 5 S. W. R. 704 ; 49 Ark. 397	166
Boyer v. Schofield , 2 Keyes, 625	442
Boykin v. Cook , 61 Ala. 172	198
Boyle v. Turner , Gaspar. 17	291
Boynton v. Willard , 10 Pick. 166	163
Boyster v. Dodsworth , 6 T. R. 681	254
Brackott v. People , 3 N. E. R. 723 ; 115 Ill. 29	114
Bradford v. State , 7 Neb. 109	372 <i>j</i>
Bradley v. Andrews , 51 Vt. 525	
Bradley v. Eyre , 11 M. & W. 150	485
Bradley v. Jamison , 16 Iowa, 68	168
Bradley v. Luce , 99 Ill. 234	708(<i>Ad.</i>)
Bradley v. Urquhart , 11 M. & W. 160	485
Bradley v. Bank , 20 Ind. 528	
Bradstreet v. Neptune Ins. Co. , 3 Sum. 600	523, 603, 610
Brady v. Huff , 75 Ala. 81	128
Brahmanayaki v. Krishna , I.L.R., IX Mad., 96, 92	958, 692
Braiden v. Mercer , 11 Ohio St. 339	226 <i>d</i>
Brammoye Dassee v. Kristo Mohun , I.L.R., II Cal., 222	191
Brannenburgh v. Indianapolis Ry. Co. , 74 Am. Dec. 250 ; 13 Ind. 103	633
Brazill v. Isham , 12 N. Y. 9	125
Breull, ex parte , 16 Ch. D. 484	352, 359(<i>Ad.</i>)
Brewer v. State , 6 Lea. 198	478
Brickell v. Bell , 84 N. C. 82	
Brickhouse v. Sutton , 6 Am. St. Rep. 497 ; 99 N. C. 103	445, 473
Bridge v. Gray , 25 Am. Dec. 358 ; 14 Pick. 55	
Bridgeport Ins. Co. v. Wilson , 34 N. Y. 280	

	PAGE
Bridgeport Savings Bank v. Eldredge, 73 Am. Dec. 688 ; 28 Conn. 556	442
Briggs v. Richmond, 20 Am. Dec. 526 ; 10 Pick. 391	87
Brigham v. Fayerweather, 144 Mass. 48 ; 140 Mass. 411 ; 5 N. E. R. 265	237, 516
Brightman v. Brightman, 1 R.I. 112	684a, 688, 691, 725, 726
Brindabun Ohunder v. Dhununjoy, I.L.R., V Cal., 246	112
Brindabun Chandra v. Chandra Kurmokar, I.L.R., XII Cal., 140	267
Brinkerhoff v. Brown, 4 Johns. Ch. 671	719
Brinsmead v. Harrison, L. R. 6 C. P., 584, L. R. 7 C. P., 551 ; S. C. on appeal. 734, 750, 751	
Briscoe v. Bronaugh, 46 Am. Dec. 108 ; 1 Tex. 326	721
Britain v. Cowen, 5 Humph. 314	482
British South Africa Co. v. Companhia de Mocambique, [1892] 2 Q. B., 358, S.C.	
On Appeal, (1893) Ap. Ca. 602	331, 365
Brito v. Secretary of State for India, I.L.R., VI Bom., 251	357
Brittain v. Kinnaird, 1 Br. & Bing. 432	427(Ad.)
Brittain v. Mull, 6 S. E. R. 382 ; 99 N. Car. 483	167
Britton v. Thornton, 112 U. S. 526	56(Ad.)
Brock v. Frank, 51 Ala. 91	527
Brojendra Nath v. Budge Budge Jute Mill Co., I.L.R., XX Cal., 527	69, 296
Brojo Behari Mitter v. Kedar Nath, I.L.R., XII Cal., 580	169, 201
Brojo Lall v. Khettur Nath, XII W. R., 55	93
Brooklyn v. Insurance Co., 99 U. S. 362	232
Brooks v. Davey, 109 N. Y. 494	684a
Broughton v. Bradley, 73 Am. Dec. 474 ; 34 Ala. 694	527
Brown v. Birdsall, 29 Barb. 549	622(Ad.)
Brown v. Bradford, 30 Ga. 927	224
Brown's Case, 2 East P. C. 496	350
Brown v. Chaney, 1 Kelly. (Ga.) 412	159
Brown v. Cure of Montreal, L. R. 6 P. C., 157	263(Ad.) 265
Brown v. Desmond, 100 Mass. 27	337
Brown v. Dudley, 33 N. H. 511	202
Brown v. Guthrie, 39 Hun. 29	482
Brown v. London & North West Ry. Co., 32 L. J. Q. B., 318	366
Brown v. Mc Kinally, 2 Esp. 278	76
Brown v. New York, 66 N. Y. 385 ; 5 Daly. 581	77
Brown v. Nichols, 42 N. Y. 26	436
Brown v. Shannon, 20 How. 55	290
Brown v. Union Insurance Co., 4 Am. Dec. 204, 4 Day. 179	512(Ad.)
Brown v. Wootton, Cro. Jac. 73 ; Yel. 67 ; Moor. 62	735, 737
Browne v. Joy, 2 Johns. 221	682
Brownfield v. Weight, 9 Ind. 394	436(Ad.)
Bruce v. Cloutman, 81 Am. Dec. 111 ; 45 N. H. 37	464
Brunsdon v. Humphrey, 14 Q. B. D., 141	3, 12, 633, 640
Brunskill v. Powell, 1 L. M. & P. 550	654
Bryan v. Auston, 10 La. Ann. 612	388(Ad.)
Buchanan v. Rucker, 9 East, 192	563
Buck v. Colbath, 3 Wall. 334	518, 520, 676(Ad.)
Buck v. Wilson, 113 Pa. St. 423	652, 655
Bucker v. Pierson, 5 Mich. 461	732
Buckland v. Johnson, 15 C. B. 145	752
Buckley v. Hann, 5 Exch. 43	359(Ad.)
Budan Sheikh v. Ramchandra, I. L. R., XI Bom., 537	35, 763
Buffington v. Cook, 73 Am. Dec. 491 ; 35 Ala. 312	172
Buffum v. Ramsdell, 92 Am. Dec. 589 ; 55 Me. 252	402
Building and Loan Ass. v. Chalmers, 7 Am. St. Rep. 173 ; 75 Cal. 332	182
Buldeo Doss v. Mool Koor, II All. H. C. R., 19	321
Bull v. Hopkins, 7 Johns. 21	52c
Bull v. Hutchins, 32 Beav. 615	693
Bumpus v. Fisher, 21 Tex. 567	434
Bumstead v. Read, 31 Barb. 669	425
Bunbury v. Fuller, L. R. 9 Ex., 140	439
Bungsee Singh v. Soodist Lall, I. L. R., VII Cal., 739 ; X C. L. R., 263	621
Bunnell v. Pinto, 2 Conn. 431	652
Burke v. Jackson, 22 Ohio. 268	400
Burke v. Miller, 4 Gray, 114	130(Ad.)
Burks v. Bennett, 62 Tex. 277	384

	PAGE
Burles v. Shannon , 115 Mass. 438 532	532
Burles v. Shannon , 96 Am. Dec. 733; 99 Mass. 200 129(Ad.)	129(Ad.)
Burn v. Cole , Ambler, 416 525	525
Burnett v. Smith , 4 Gray, 50 48, 623, 625	48, 623, 625
Burnham v. Webster , 1 Wood B. & M., 172 546	546
Burns v. Garvin , 1 8 Ind. 320 160	160
Burage v. Bonanza , G. & Q. M. Co., 12 Or., 169 488	488
Burritt v. Belfy , 36 Am. Rep. 79; 47 Conn., 323 660	660
Burt v. Sternburgh , 15 Am. Dec. 402; 4 Cow., 559 64(Ad.), 130(Ad.)	64(Ad.), 130(Ad.)
Burton v. Burton , 28 Ind., 342 144	144
Burton v. Spiers , 92 N. C. 503 438(Ad.)	438(Ad.)
Burton v. Wilkinson , 18 Vt., 186 236(Ad.)	236(Ad.)
Bush v. Lindsey , 71 Am. Dec. 117; 24 Ga., 245 427	427
Bussan Lall v. Chundee Dass , I. L. R., IV Cal., 686; IV C. L. R., 1 61, 177	61, 177
Butcher v. Bank of Brownsville , 83 Am. Dec., 446; 2 Kan., 70 435	435
Butler v. Ablewhite , 6 C. B. N. S., 740 349	349
Butler v. Wagoner , 35 Wis., 54 316(Ad.)	316(Ad.)
Butler v. Hildreth , 5 Met., 49 526	526
Buttrick v. Allen , 5 Am. Dec. 105; 8 Mass., 273 547	547
Buzloor Ruheem v. Shumsoonnissa Begum , XI M. I. A., 551 266, 616, 628, 630, 659	266, 616, 628, 630, 659
Bybee v. Summers , 4 Or., 354 704	704
Byrne v. Prather , 14 La. Ann., 653 144	144

C

Cabell v. Vaughan , 1 Wms. Saund., 230a 741	741
Cadaval v. Collins , 4 Ad. & El., 858 72	72
Cailleteau v. Ingouf , 14 La. Ann., 623 476	476
Cain v. Williams , 16 Nev., 430. 144(Ad.)	144(Ad.)
Calderwood v. Brooks , 28 Cal., 151... .. 185	185
Caliprasaud v. Prankissen , Mor., 165 356	356
Calkins v. Allerton , 4 Barb., 171 220	220
Callahan v. Griswold , 9 Mo., 775 488	488
Callen v. Ellison , 82 Am. Dec. 448; 13 Ohio St., 446 432, 446	432, 446
Calloway v. Byram , 95 Ind., 423 451	451
Cambefort v. Chapman , 19 Q. B. D., 229 734, 742, 745	734, 742, 745
Camden v. Plain , 91 Mo., 117 427	427
Cammell v. Sewell , 3 H. & N. 646; 27 L. J. Ex., 447; S. C. in error 5 H. N., 728... .. 595	595
Camp v. Forrest , 13 Ala., 120 684a	684a
Campbell v. Consalus , 25 N. Y., 613 61	61
Campbell v. Cross , 39 Ind., 155 56(Ad.)	56(Ad.)
Campbell v. Kuhu , 45 Mich., 513 166	166
Campbell v. Swasey , 12 Ind., 70 414	414
Canal Bank v. Hudson , 111 U. S., 66 715(Ad.)	715(Ad.)
Candee v. Lord , 51 Am. Dec. 294; 2 N. Y., 269 2 Comst., 27 236(Ad.), 237	236(Ad.), 237
Cannon v. Brame , 45 Ala., 262 12(Ad.)	12(Ad.)
Cannon v. Mc Daniels , 46 Tex., 303 460	460
Cannon River Ass'n v. Rogers , 18 Am. St. Rep. 497; 43 N. W. R., 792; 42 Minn., 123 161	161
Caperton v. Schmidt , 85 Am. Dec. 187; 26 Cal., 479 56(Ad.)	56(Ad.)
Capper v. Sibley , 23 N. W. R., 153; 65 Iowa, 754 481	481
Carcoran v. Chesapeake , 94 U. S., 741 182	182
Carleton v. Washington Ins. Co. , 35 N. H., 162 425, 464	425, 464
Carmen v. Newell , 1 Den., 25 385(Ad.)	385(Ad.)
Carmichael v. Foster , 69 Ga., 372 684a	684a
Carmony v. Hooper , 5 Pa. St., 305 113(Ad.)	113(Ad.)
Carnes v. Mitchell , 48 N. W. R., 941 468	468
Carpenter v. Canal Co. , 35 Ohio, 307 210	210
Carpenter v. Pier , 73 Am. Dec. 288; 30 Vt., 81 229	229
Carpentier v. Oakland , 30 Cal., 439 432, 436, 486, 491	432, 436, 486, 491
Carr v. Cates , 96 Mo., 271 700	700
Carr v. Farington , 63 N. C., 563 712	712
Carr v. Lewis Coal Co. , 9 Am. St. Rep. 328; 96 Miss., 149 341, 730	341, 730
Carr v. Lewis , 15 Mo. App. R., 551 691	691
Carr v. Miner , 42 Ill., 179 491	491

	PAGE
Carrol v. Commonwealth, 84 Pa. St., 107	478(<i>Ad.</i>)
Carrol Co. v. Smith, III U. S., 556... .. .	715(<i>Ad.</i>)
Carron v. Martin, 69 Am. Dec. 584 ; 2 Dutcher, 594	398
Carron Iron Company v. Maclaren, 5 H. L. Cas., 437	368, 371, 681
Carter v. Hanna, 2 Ind., 45	63(<i>Ad.</i>)
Carter v. Mills, 30 Mo., 432	695
Carter v. Roland, 53 Tex., 540	483
Caruth v. Grigsby, 57 Tex., 259	182
Case v. Beauregard, 101 U. S., 688	64
Casebeer v. Mowry, 93 Am. Dec. 766 ; 55 Pa. St., 419	34, 147
Castleman v. Relfe, 50 Mo., 583	460
Casoni v. Jerome, 58 N. Y., 315	226 <i>d</i>
Cassidy v. Kluge, 73 Tex., 154	695
Cassidy v. Leech, 2 Abb. N. C. 315 ; 53 How., 108	375
Castellaw v. Guilmartin, 54 Ga., 299	198
Caston v. Perry, 11 Am. Dec., 482 ; 1 Bail. 533	68
Castle v. Noyes, 14 N. Y., 335	159, 221
Castrique v. Behrens, 30 L. J. Q. B., 163	81, 595, 597
Castrique v. Imrie, 8 C. B. N. S., 405 ; 30 L. J. C. P., 177 ; on appeal L. R. 4 H. L. 414 ; 32 L. J. Ch. 249	499, 504, 537, 539, 543, 559, 584, 591, 602, 606
Catterina Chiazzare, 1 P. D., 368	682
Cauhape v. Parke, 64 Hun. (N. Y.) 306	30
Cavanaugh v. Buchler, 120 Pa. St., 441	60
Cavender v. Ward, 28 S. C., 470	293
Caylus v. New York, R. R. Co., 76 N. Y., 609	526
Cecil v. Cecil, 81 Am. Dec., 626 ; 19 Md., 72	158
Central Bank v. Gibson, 11 Ga., 453	397, 412(<i>Ad.</i>)
Central Baptist C. & S. v. Manchester, 33 Am. St. Rep. 893 ; 17 Rh. L., 492	161(<i>Ad.</i>)
Central Trust Co. v. Seasongood, 9 S. C. R., 579	482
Centro v. Planters Bank, 22 Ala., 743	730(<i>Ad.</i>)
Certain Mahogany Logs, 2 Sum., 592 ; 130 U. S., 482	507, 679
Chaffee v. Hooper, 54 Vt., 513	455
Chamberlain v. Blodgett, 10 S. W. R. 444 ; 96 Mo., 482	193, 465
Chamberlain v. Gaillard, 26 Ala., 504	129
Chamberlain v. Preble, 11 Allen, 370	126, 127(<i>Ad.</i>)
Chambers v. Clearwater, 1 Abb. App. Dec., 341	414
Chambers v. Hodges, 23 Tex., 104	386
Chamley v. Dusany, 2 Seb. & Lef., 690	175
Chand Kour v. Partap Singh, L. R. XV I. A., 156 ; I. L. R., XVI Cal., 98 ; 1888 P. R., No. 177 P. C.	11, 109
Chandu v. Kombi, I. L. R., IX Mad., 208	294, 405
Chandu v. Kunhamed, I. L. R., XIV Mad., 324	173, 217
Chant v. Reynolds, 49 Cal., 213	197, 200(<i>Ad.</i>)
Chapin v. James, 23 Am. Rep., 412 ; 11 R. I., 86	523, 677
Charta v. Puran Sahh, 2 Agra. Rep., 256	61
Chase v. Christianson, 41 Cal., 253	455(<i>Ad.</i>), 476
Chase v. Kaynor, 43 N. W. R. 269 ; 78 Iowa, 449	468
Chase v. Walker, 26 Me., 555	47
Chathappan v. Pydel, I. L. R., XV Mad., 403	34, 761
Chaudron v. Magee, 8 Ala., 570	695
Cheatham v. Brien, 3 Head, 552	481
Cheek v. Pugh, 19 Ark., 574	401, 402
Cheek v. Merchant's N. Bk., 9 Heisk., 489	478
Cheever v. Wilson, 9 Wall., 108	534, 535
Cheever v. Minton, 13 Am. St. Rep., 258 ; 12 Col., 557	703
Cheney v. Stone, 29 Fed. Rep., 885	113
Chenvirappa v. Puttappa, I. L. R., XI Bom., 708	80, 485
Cheriot v. Foussat, 3 Binn., 220	610(<i>Ad.</i>)
Chet Ram v. Bahal Singh, XV P. R., 261 ; 1880 P. R., No. 108	36, 51, 58, 214, 218
Chetti Gaundan v. Sundarum, II M. H. C. R., 51	322
Chevallier v. State, 10 Tex., 315	372 <i>d</i> , 372 <i>g</i>
Chicago, B. & Q. R. Co. v. Schaffer, 124 Ill., 112	642
Chicago & A. R. R. Co. v. Summers, 3 Am. St. Rep., 616 ; 14 N. E. R., 735 ; 113 Ind., 10	387, 388, 398(<i>Ad.</i>)
Chicago L. Ins. Co. v. Auditor, 100 Ill., 478	138(<i>Ad.</i>)
Chicago Ry. Co. v. McAuley, 121 Ill., 160	642

	PAGE
Chicago, etc., R. Co. v. Northern line Packet Co., 70 Ill., 217	232
Chicago R. Co. v. State, 53 Wis., 509	372i
Childs v. Powder Works, 45 N. H., 547	34(Ad.)
Chinnammal v. Tulu Kannatammal, III M. H. C. R., 148	360
Chinnasami v. Hariharabadra, I. L. R., XVI Mad., 380	157
Chiunniya Mudali v. Venkata Chella Pillai, III M. H. C. R., 320	38, 56, 65, 88
Chipman v. Martin, 13 Johns., 240	672
Chiranj Mal v. Creditors, 1884 P. R., No. 145	28
Chockalinga Pillai v. Viruthalam, IV M. H. C. R., 334	663
Chouteau v. Gibson, 76 Mo., 38	764
Chrisman v. Harman, 26 Am. Rep. 387; 29 Gratt., 494	137
Christy v. Springval, W.W., 84 Cal., 541	58(Ad.)
Chukkun Lal Roy v. Lolit Mohan Roy, I. L. R., XX Cal., 906	191(Ad.)
Chundee Churn v. Eduljee, II C. L. R., 225; I. L. R., VIII Cal., 678	360
Chunder Coomar v. Sib Sundari, I. L. R., VIII Cal., 631	146
Chunder Coomar Mundal v. Nunnee Khanum, XIX W.R., 322; XI B. L.R., 434.	277, 392
Chundo v. Kunhamed, I. L. R., XIV Mad., 324	173
Chunder Nath v. Nilakant, I. L. R., VIII Cal., 690	713
Chuni v. Birjo, XIII C. L. R., 49	59
Cidan v. Mazar Husein, I. L. R., 1 All., 488	267
Chunni Lal v. Banaspat Singh, I. L. R., IX All., 23	621, 672
Cilley v. Van Patten, 68 Mich., 80	293
Citizen's Bank v. Brooks, 23 Fed. Rep. 21	560
City of Camden v. Allen, 26 N. J. L., 399	372g
City of London v. Wood, 12 Mod., 669	384(Ad.)
City of New Orleans v. Davidson, 30 La. Ann., 541	372g
Claffin v. Dunne, 16 Am. St. Rep. 263; 129 Ill., 241	401, 407
Claffin v. Fletcher, 7 Fed. Rep., 851	160
Clapp v. Graves, 26 N. Y., 118	473
Clark v. Boggs, 6 Ala., 809	720
Clark v. Bryan, 16 Md., 171	123, 432
Clark v. Dunnam, 46 Cal., 205	140
Clark v. Jones, 13 Am. Dec. 706; 1 Denio, 516	661
Clarke v. Kochler, 32 Tex., 679	687(Ad.)
Clarke v. Lamb, 2 Allen, 396	384(Ad.), 385
Clarke v. Matthewson, 12 Pet., 184	408(Ad.)
Clark's Heirs v. Farrow, 52 Am. Dec. 552; 10 B. Mon., 446	703
Clark v. Tarbell, 58 N. H., 88	342
Clark v. Wolf, 29 Iowa, 197	208
Clarkson v. Morgans, Dev. 6 B. Mon., 441	702, 705
Clary v. Hoagland, 61 Cal., 685	435
Clarey v. Marshall's Heirs, 4 Dana., 95	702
Clay v. Barlow, 123 Mass., 378	293
Clegg v. Dearden, 12 Ad. & El. N. S., 576	640
Clemens v. Clemens, 37 N. Y., 59	64(Ad.)
Clements v. Collins, 59 Ga., 124	228
Clements v. State, 77 N. Car., 142	372i
Cleveland v. Boerum, 24 N. Y., 613	687(Ad), 711
Cleveland v. Creviston, 47 Am. Rep., 367; 93 Ind., 31	47
Cleveland v. Marine Bank, 17 Wis., 545	206
Cleveland v. Welsh, 4 Mass., 491	
Clifford v. Cony, 1 Mass., 495	
Clinton Bank v. Hart, 5 Ohio, 33	736
Cloud v. El Dorado Co., 73 Am. Dec. 526; 12 Cal., 128	476
Cloud v. Inhabitants, 86 Mo., 357	444
Cloud v. Wiley, 29 Ark., 80	144, 737
Clough v. London, L. R. 7 Ex., 26	52b
Coalfield Co. v. Peck, 98 Ill., 139	206
Cobb v. Elizabeth City, 75 N. C., 1	372g
Cobb v. People, 84 Ill., 511	414(Ad.)
Cockburn v. Thompson, 16 Ves., 321	211
Cocke v. Jenner, Hob., 66	734, 754
Coe v. Mansean, 62 Wis., 81	684a
Coffee v. Neely, 2 Heisk., 304	594
v. Bulwinkle, 1 E. D. Smith (N.Y.), 484	

	PAGE
Coit v. Haven, 79 Am. Dec. 244 ; 30 Conn., 190 ...	432, 447
Coit v. Tracy, 20 Am. Dec. 110 ; 8 Conn., 268 ...	63
Colburn v. Woodworth, 31 Barb., 381 ...	655
Cole v. Butler, 43 Me., 401 ..	206
Cole v. Favorite, 69 Ill., 457 ..	163, 234
Cole v. Hayes, 78 Me., 539 ...	293
Coleman's Appeal, 75 Pa. St., 441 ...	420(Ad.)
Coleman v. Coleman, 28 Am. Dec., 86 : 3 Dana., 398 ...	166(Ad.)
Coles v. Allen, 64 Ala., 98 ...	185
Coles v. Peck, 96 Ind., 333 ..	296(Ad)
Coles v. Yorks, 31 Minn., 213 ...	675
Collector of Sholapur v. Nana, 1874, Bom. P. J., 14 ...	174
Collins v. Bennett, 46 N. Y., 490 ...	73
Collins v. Mitchell, 5 Fla., 364 ...	234
Collins v. Knight, 3 Tenn. Ch., 187 ...	407
Collins v. Lemasters, 21 Am., Dec. 469 : 1 Bail. L., 348 ...	742
Collins v. Ryan, 32 Barb., 647 ...	444
Coloma v. Eaves, 92 U. S., 484 ...	438
Colorado I. W. v. Sierra Grande M. Co., 22 Am. St. Rep. 433 ; 15 Colo., 499 ...	368
Clorick v. Swinbourne, 105 N. Y., 593 ...	642
Colette v. Cole, 20 Iowa., 310 ...	108
Colt v. Colt, 4 S. C. R. 553 ; 111 U. S., 566 ...	166, 182
Colton v. Rupert, 27 N.W.R., 520 : 60 Mich., 318 ...	465
Colvin v. Corwin, 15 Wend., 557 ..	652
Colyer v. Finch, 5 H. L. C., 905 ..	336
Commissioners v. Aspinwall, 21 How., 539 ...	438
Commissioners v. Hinchman, 31 Kan., 729 ...	208
Commissioners of Sewers v. Gellatly, 3 Ch. D., 610 ...	211(Ad.)
Commissioners of Marion Co. v. Welch, 40 Kan., 770 ...	88(Ad.)
Commonwealth v. Hopkins, 2 Dana., 395 ...	123
Commonwealth v. Owensboro and N. R. R. Co., 81 Ky., 573 ...	372h
Commonwealth v. Matlack, 4 Dall., 203 ...	372g
Commonwealth v. McCleskey, 2 Rawle., 369 ...	287 (Ad.)
Companhia de Mozambique v. British South Africa Co., (1892) 2 Q. B., 358.	342, 328, 362, 364
Concha v. Concha, 11 Ap. Can., 511 ...	515
Conery v. Rochford, 31 L. Ann., 520 ...	438
Conger v. Chilcote, 42 Iowa, 18 ...	163
Conn v. Bernheimer, 67 Miss., 408 ...	114(Ad.)
Connecticut v. Bradish, 10 Mass., 293 ...	384(Ad.)
Conner v. Reeves, 103 N. Y., 527 ...	226
Connelly v. Woods, 31 Kan., 359 ...	451
Connihan v. Thompson, 111 Mass., 270 ...	51h
Connolly v. Edgerton, 22 Neb., 82 ...	453
Conway v. Ellison, 14 Ark., 362 ..	542
Cook v. Brown, 28 Am. Rep. 259 ; 125 Mass., 503 ...	622(Ad.)
Cook v. Cook, 43 Am. Rep. 706 ; 56 Wis., 195 ...	533, 534
Cook v. Darling, 18 Pick., 393 ...	411
Cook v. Gill, 8 C. P., 107	
Cook v. Moseley, 13 Wend., 277	
Cook v. Parham, 63 Ala., 456 ..	
Cooke v. Woodrow, 5 Cranch., 13 ..	290
Cookney v. Anderson, 1. D. J., & S. 365 ; 32 L. J. Ch., 427 ...	364
Cooksey v. Kansas City R. Co., 74 Mo., 477 ...	620
Cooper v. American Cent. Ins. Co. 3 Col., 318 ...	
Cooper v. Brewster, 1 Minn., 94 ...	
Cooper v. Corbin, 105 Ill., 224 ...	185
Cooper v. Reynolds, 10 Wall., 308 ..	240, 243, 377, 474,
Cooper v. Shepperd, 3 C. B., 265 ...	
Copin v. Adamson, 9 Exch., 345 ...	
Coppinger v. Rice, 33 Cal., 108 ...	524
Corbet v. Barnes, Wm. Jon. Rep., 375 ...	734, 754
Corbett v. General Steam Nav. Co., 4 Hurl & N., 482 ..	361
Corcoran v. Chesapeake Canal Co., 94 U. S., 741 ..	
Corey v. Gale, 13 Vt., 638 ..	
Corkings v. State, 99 N. Y., 491 ...	

	PAGE
Cornett v. Williams, 20 Wall., 226	474
Corning v. White, 22 Am. Dec. 659 ; 2 Paige, Ch., 567	719
Corse v. Sanford, 14 Iowa, 235	206
Corwithe v. Griffin, 21 Barb., 9	454
Coster v. Mayor of Albany, 43 N. Y., 399	372i
Cothran v. Brower, 75 Ga., 494	127
Cotzhausen v. Kerting, 29 Fed. Rep., 821	489
Cottingham v. Earl of Shrewsbury, 3 Hare Rep., 627	175
Covell v. Heyman, 111 U. S., 176	720
Covenant, etc., Ins. Co. v. Clover, 36 Mo., 392	403
Covington Bridge Co. v. Sargent, 27 Ohio, 237	16
Cowan v. Braidwood, 1 Man. & Gr., 582	587, 591
Cox v. Mitchell, 7 C. B. (N. S.), 55	680
Cox v. Thomas's Adm'r, 9 Gratt., 323	411
Crabtree v. Welles, 19 Ill., 55	69(Ad.)
Crafts v. Dexter, 42 Am. Dec. 666 ; 8 Ala., 767	411
Craig v. Smith, 15 Pac. R., 337	677(Ad.)
Craig v. Watson, 68 Ga., 114	56(Ad.)
Crane v. Blum, 56 Tex., 325	466
Crane v. Larsen, 15 Pac. R., 326	678(Ad.)
Crank v. Flowers, 4 Heisk., 631	402
Cranstown v. Johnston, 3 Ves. 170 ; 3 R. R., 80	334, 336
Crawford v. Howard, 30 Mo., 422	430
Crawley v. Isaacs, 16 L. T., 579	588, 595
Crenshaw v. Julian, 4 Am. St. Rep. 719 ; 26 S. Car., 283	482
Crim v. Kessing, 89 Cal., 478	428
Crisp v. Watson, I. L. R., XX Cal., 689	840
Crispen v. Hannovan, 86 Mo., 160	403
Crispin, <i>Ex parte</i> 8 Ch. Ap., 374	362
Croft v. King, [1893] 1 Q. B. D., 419	404
Cromwell v. Clay, 1 Dana., 579	696
Cromwell v. Sac, 94 U. S., 350 (1871)	7, 17, 84
Cropper v. Com, 2 Rob., 812	287
Crosby v. Jeroloman, 37 Ind., 277	623, 744
Crosley v. Hutton, 98 Mo., 196	409
Cross v. Armstrong, 44 Ohio., 613	497
Cross v. Wilson 12 S. W. R. 576; 52 Ark., 312	466
Croudson v. Leonard, 4 Cranch, 431	516(Ad.), 606
Crow v. Meyersieck, 89 Mo., 415	441
Crowther v. Rowlandson, 27 Cal., 376	139
Cruchon v. Brown, 57 Mo., 38	403
Cruikshank v. Gardner, 2 Hill., 333	401
Crum v. Boss, 48 Iowa, 433	61
Cucullu v. La. Ins. Co., 16 Am. Dec. 199 ; 5 Martin, N. S., 464	512
Cuddy, <i>Ex parte</i> , 131 U. S. 280	238b
Culley v. Laybrook, 8 Ind., 285	293
Crelver v. Woodruff Co., 5 Dill, 392	406(Ad.)
Cummings v. Banks, 2 Barb., 601	553, 554
Cummings v. Harrison, 57 Miss., 275	234
Cummings v. Tabor, 61 Wis., 185	468
Cummisky v. Cummisky, 109 Pa. St., 1	435
Cunningham v. Jacobs, 22 N. E. R. 335 ; 120 Ind., 306	238 b
Cunningham v. Macon etc R. R. Co., 109 U. S., 446	222, 372 d
Cunningham v. Morris, 65 Am. Dec. 611 ; 19 Ga., 583	52 (a.)
Currie v. Fowler, 5 J.J. Marsh., 145	691
Curtis v. Cisna's Adm'r, 1 Ohio., 432	163
Curtis v. Wilcox, 41 N. W. R., 863	388(Ad.)
Cutler v. Cox, 18 Am. Dec. 152; 2 Blatchf., 178	52

D

Dabney v. Bank of S. Car., 3 S. Car., 124	
Dadabhai v. Diogo Sauldanha, I. L. R., XVIII Bom., 43	343
Dadaji Bhikaji v. Rukhmabai, I. L. R., IX Bom., 529	268
Dahms v. Alston, 34 N. W. R., 182 ; 72 Iowa, 411	465
Dale v. Sumer Co., 48 Ark., 188	77

	PAGE
Dalgleish v. Hodgson, 7 Bing., 504	478
Dalton v. Libbey, 9 Nev., 192	289
Damodhar v. Trimbak, I. L. R., X Bom., 370	405
Dampe v. Dane, 29 Wis., 419	374j
Danolds v. State, 42 Am. Rep. 377 ; 89 N. Y., 36	694a
Dancy v. Duncan, 96 N. Car., 111.	461(Ad)
Danforth v. Thompson, 34 Iowa, 243	521
Daniel Kaine, 35 Fed. Rep., 786	691
Daniels v. Henderson, 40 Cal., 242	726
Daniel v. Hodges, 87 N. C., 97	478
Danziger v. Williams, 91 Pa. St., 234	634, 639
Darley Main Colliery Co. v. Mitchell, 11 App. Cas., 144	243
Darling v. Conklin, 42 Wis., 478	388
Darling v. Pierce, 15 Hun., 543	315
Dashiell v. Slingerland, 60 Cal., 653	76
Davenport v. Hubbard, 14 Am. Rep., 620 ; 46 Vt., 200	396(Ad)
David v. Grish Chunder Guha, I. L. R., IX Cal., 183	298
Davidas Harijivandas v. Tyubally Abdul Ally, I. L. R., X Bom., 30	416
Davidson v. Gill, 1 East, 64	29
Davies v. Mayor, 93 N. Y., 250	87
Davis v. Bedsole, 60 Ala., 362	488
Davis v. Davis, 6 Me., 395	439
Davis v. Dresback, 81 Ill., 393	677(Ad.)
Davis v. Dunklee, 9 N. H., 545	68(Ad.)
Davis v. Durgin, 64 N. H., 51	451
Davis v. Eppinger, 79 Am. Dec. 184 ; 18 Cal., 378	479
Davis v. Fish, 48 Am. Dec. 387 ; 1 G. Greene, 406	
Davis v. Headley, 22 N. J. Eq. 115	
Davis v. Hedges, 6 Q. B., 687	69, 75
Davis v. Murphy, 45 Am. Dec., 749 ; 2 Rich., 560	72
Davis v. Ranklin, 50 Tex., 279	715(Ad)
Davis v. Smith, 79 Me., 351	231
Davis v. Tallcot, 12 N. Y., 184	73, 78, 85
Dawes v. Shed, 8 Am. Dec. 80 ; 15 Mass., 6	226d
Dawkins v. Autrobus, 7 Ch. Div., 615	263(Ad), 235
Dawkins v. Simonette, 50 L. J. P., 30	512
Dawley v. Brown, 79 N. Y., 390	56(Ad.)
Dawson v. Baum, 19 Pac. Rep., 46	669
Dawson v. Mead, 71 Wis., 295	694
Day v. Holland, 15 Or., 464	144
Day v. Vallette, 87 Am. Dec. 353 ; 25 Ind., 42	137
Day v. Zimmerman, 68 Pa. St., 72	718(Ad.)
Dayachand v. Hemchand, I. L. R., IV Bom., 515	210
Dean v. Chapin, 22 Mich., 275	507
Dean v. Nelson, 10 Wall., 158	462
Dean v. Ridgway, 6 S. R., ...	113
Dean v. Thatcher, 32 N. J. L., 473	127(Ad.)
Deering v. Bank of Charleston, 48 Am. Dec. 300 ; 5 Ga., 497	378
Debell v. Foxworthy, 9 B. Mon., 228	703
Debi Prasad v. Jafar Ali, I. L. R., III All., 40	277
Debi Singh v. Hanuman, I. L. R., III All., 747	410
De Brimont v. Penniman, 10 Blatch., 436	599
De Camp v. Miller, 44 N. J. L., 617	290
Decatur Gas Light Co. v. Howell, 92 Ill., 19	630(Ad.), 641
Deck v. Deck, 2 Sw. & Tr., 90	528, 566
Deck v. Johnson, 30 Barb., 280	226c
De Haven v. Covalt, 83 Ind., 344	451
Delaware D. Co. v. Com., 100 Am. Dec., 570 ; 60 Pa. St., 367	372i
Delosse Brissac v. Rathbone, 6 H. & N. 301 ; 30 L. J. Ex., 288	540, 569, 584
Delhi & London Bank v. Orchard, I. L. R., IV I. A. 127 ; I. L. R., III Cal., 47	762
Delhi & London Bank v. Wordie, XXV W. R., 272 ; I. L. R., I Cal., 249	319
De La Gurrea v. Newhall, 55 Cal., 21	629
Delta, The, 1 P. D., 393	33(Ad), 581
De Medina v. Grove, 10 Q. B., 172	81
De Meli v. De Meli, 17 Am. St. Rep. 655 ; 120 N. Y., 485	348, 352, 374
Demeritt v. Lyford, 27 N. H., 541	491

TABLE OF CASES.

	PAGE
De Metton v. De Mello, 2 Camp., 420	485
Denegre v. Denegre, 33 La. Ann., 689	182
Denning v. Norris, 2 Lev., 243	413
Denobundhoo v. Kristomonee, I. L. R., II Cal., 152	15, 56, 92, 96, 120
Denpree v. Denpree, 45 Ga., 414	385(Ad.)
Dent v. Smith, 4 Q. B. 414	539, 583
Denton v. Marshall, 32 L. J. Ex., 89	417
Deo v. Earl of Derby, 1 Ad. & Ell., 768	186
Deodhari Singh v. Sewsurun, III C. L. R., 395	112
Deokee Nundun v. Kaleo Pershad, VIII W. R., 366	66, 168
Deokishen v. Bansi, I. L. R., VIII All., 172	461
Dequindre v. Williams, 31 Ind., 444	516(Ad.)
Derby v. Stevens, 64 Cal., 287	287, 293
De Saussure v. Gaillard, 127 U. S., 216	372i
De Souza v. Coles, III M. H. C. R., 405	626, 627
Devaughn v. Devaughn, 19 Gratt., 556	426(Ad.)
Devie v. Brownlow, 2 Dickens, 611	678
Devin v. Ottumva, 53 Iowa, 461	177
Devol v. Halstead, 16 Ind., 287	744
Dev Ray Krishna v. Halambhai, I. L. R., I Bom., 87	12, 52d
Dewey v. Greene, 4 Denio., 94	415
Dewey v. Peck, 33 Iowa, 242	16
Dewey v. St. Albans T. Co., 6 Am. St. Rep. 81; 60 Vt. 1	108(Ad.), 210
Eheru Mal v. Thakoor Das, 1891 P. R., No. 1	303
Dhunput Sing v. Sham Soonder, I. L. R., V Cal., 291	748
Diamond v. Lawrence County, 78 Am. Dec., 429; 37 Pa. St., 353	717
Dickinson v. Hoomes, 8 Gratt., 353	339
Dickerson v. Chrisman, 28 Mo., 141	404
Dickerson v. Davis, 12 N. E. R., 145; III Ind., 433	167
Dicks v. Hatch, 10 Iowa, 380	461 (
Diggs v. Wolcott, 4 Cranch., 179	
Dillard v. Noel, 2 Ark., 449	
Dillinger v. Kelley, 84 Mo., 561	114(Ad.)
Dillingham v. Russell, 15 Am. St. Rep., 753; 73 Tex., 47	521
Dillon v. Alvares, 4 Ves. 357; 4 R. R., 206	679
Dillon v. Porter, 31 N. W. R., 56; 36 Minn., 341	403
Dimes v. Grand Junction Canal Co., 3 H. L. Ca., 759; 16 Eng. L. & Eq., 63	387
Dinanath v. Sadashiv, I. L. R., III Bom., 9	256
Dinendronath v. Ramkumar, L. R., VIII I. A. 65; I. L. R., VII Cal., 107	205
Dinkar Ballal v. Hari Shridhar, I. L. R., XIV Bom., 206	27, 46
Dinkur Doyal v. Sheo Golam Singh, XXII W. R., 172	61
Dinomoyi Debia v. Anungo Moyi, IV C. L. R., 599	67
District of Clay v. District of Buchanan, 63 Iowa, 188	409
Doak v. Wiswell, 33 Mo., 355	69
Dobbins v. Hyde, 37 Mo., 114	203
Doctor v. Hartman, 74 Ind., 221	420(Ad.)
Dodge Mfg. Co. In re, 33 Am. Rep. 579; 77 N. Y., 101	386
Dodge v. Colby, 37 Hun., 515	328
Dodson v. Scroggs, 47 Mo., 285	410(Ad.)
Doe v. Jackson, 51 Ala., 514	466
Doe v. McDonald, 27 Miss., 610	398
Doe v. Oliver, 2 Sm. L. Ca. 696 (5th Edition). Vide p. 775 (8th Edition)	81
Doe v. Wright, 10 A. and E., 763	144
Doed Bush v. Lindsey, 24 Ga. 245	472(Ad.)
Doglioni v. Crispin, L. R. I H. L., 301	603
Dolphin v. Robins, 7 H. L. Cas., 390	529
Don v. Lippman, 5 Cl. & F., 1	546, 591
Doona v. Joonarain, XII W. R., 362	187
Doona v. Kashmiri Mal, XI P. R., 131	154
Doonan v. Glynn, 28 W. Va., 715	61
Doorga Nath Roy v. Kalee Narain, XXIV W. R., 212	619, 668
Doorga Prasad v. Budree, VI All. H. C. R., 1891	259
Doorga Persad v. Doorga Konwari, L. R. V. I. A. 149; I. L. R., IV Cal., 190	65
Doorga Ram v. Kally Kristo, III C. L. R., 549	57
Dorente v. Sullivan, 7 Cal., 279	466
Dorr v. Stockdale, 19 Iowa, 269	197, 198

	PAGE
Dorr. v. Rohr , 3 Am. St. Rep., 108 ; 82 Vr., 359... ..	462
Dorris v. Erwin , 101 Pa. St., 239	129
Doss Money Dossee v. Jonmenjoy Mulliah , I. L. R., III Cal., 363 ; 1 C. L. R., 446	617
Doty v. Brown , 53 Am. Dec., 350 ; 4 Comst., 71	49, 64 (<i>Ad.</i>)
Doughty v. Doughty , 27 N. J. Eq., 315 ; 28 N. J. Eq., 581	534
Douglas v. Forrest , 4 Bing. 683 ; 1 M. & P., 663	372 <i>w</i> , 563
Douglas v. Phenix Ins. Co. , 34 Am. St. Rep. 448 ; 138 N. Y., 209 516 (<i>Ad.</i>). 562 (<i>Ad.</i>), 682 (<i>Ad.</i>)	
Douglass v. Howland , 24 Wend., 35	226 <i>c</i>
Douglass v. Massie , 47 Am. Dec. 375 ; 16 Ohio, 271	401, 402
Doulson v. Mathews , 4 T. R., 503	327, 328
Downer v. Shaw , 22 N. H., 277	430
Downin v. Sprecher , 35 Md., 478	192
Doya Narain v. The Secretary of State for India in Council , I. L. R., XIV Cal., 256	358
Doyle v. Reilly , 85 Am. Dec. 582 ; 18 Iowa, 108	72
Drake v. Henshaw , 47 Iowa, 291	166
Drake v. Mitchell , 3 East., 251	672
Drake v. Perry , 58 Ill., 122	47
Drapu v. Ishun Chunder , IX C. L. R., 231	305
Dresner v. Wood , 15 Kan., 344	482, 695
Drobo Moyee v. Bipin Mundul , X W. R., 6	410, 419
Drummond v. Prestman , 12 Wheat., 551	226 <i>c</i> , 226 <i>d</i>
<i>Duches of Kingston's case</i> , 2 S. L. C. 785 (Edition 8) ; 20 How. St. Tr., 544	177, 499
Dudsar Bibee v. Shakir , XV W. R., 168	93
Duff v. Duff , 71 Cal., 513	139
Duffield v. Scott , 3 T. R., 374	231
Duffy v. Gray , 52 Mo., 528	636
Duffy v. Little , 5 Watts., 130	34 (<i>Ad.</i>)
Duffles v. Burlingham , 34 L. T., 688	569
Duke of Brunswick v. King of Hanover , 6 Beav., 50	372 <i>a</i>
Dulaney v. Payne , 40 Am. Rep. 205 ; 101 Ill., 325	651, 661
Dullabh Jogi v. Narayan , IV B. H. C. R., A. C., 110	111
Duncan v. Bancroft , 110 Mass., 267	129
Duncan Brothers and Co. v. Jeetmull , I. L. R., XIX Cal., 372	658
Duncan v. Holcomb , 26 Ind., 378	172
Duncan v. Ripley , 7 Ark., 100	414 (<i>Ad.</i>)
Duncan v. Stewart , 60 Am. Dec., 527 ; 25 Ala., 408	527
Duncan v. Ware , 5 Stew. & P., 119	203
Dunham v. Bower , 33 Am. Rep., 570 ; 77 N. Y., 76	72, 77
Dunham v. Wilfong , 69 Mo., 355	444
Dunkle v. Wiles , 5 Den., 296	56 (<i>Ad.</i>)
Dunlop v. Cody , 7 Am. Rep., 129 ; 31 Iowa, 260	491
Dunn, Ex parte 8, S. Car., 207	372 <i>j</i>
Dunn v. Crocker , 22 Ind., 324	478
Dunn v. Pipes , 20 La. Ann., 276	127
Dunnington v. Elston , 101 Ind., 373	700
Dunston v. Higgins , 34 Am. St. Rep. 431 ;	590 (<i>Ad.</i>)
Dunston v. Paterson , 5 E. B. N. S. 267 ; XIV P. R., Cr. 92	356
Duran v. Iowa City , 1 Woolv., 73	719
Durand v. Carrington , 1 Root., 353	678 (<i>Ad.</i>)
Durand v. Lord , 115 Ill., 610	704
Durga Das Laha v. Durga Charan Sha , VI W. R. C. Ref., 26	238
Durga Prasad v. Rachla Kuar , I. L. R., IX All., 140	308
Dutcher v. Dutcher , 39 Wis., 685	533
Dutil v. Pacheco , 82 Am. Dec., 749 ; 21 Cal., 438	523
Dutton v. Shaw , 35 Mich., 431	614 (<i>Ad.</i>)
Dutton v. Woodman , 57 Am. Dec., 46 ; 9 Cush., 261	56 (<i>Ad.</i>) 136 (<i>Ad.</i>)
Dwarka Das v. Jhoolal , I S. D. A. Cal. Sel. Rep., 410	355
Dwyer v. Bassett , 63 Tex., 274	
Dya Sing v. Ralia Ram , 1887 P. R., No. 26	
Dyckman v. Mayor , 5 N. Y., 424	

E

Earl v. Bull , 15 Cal., 421	
Earle v. McVeigh , 91 U. S., 503	
Earle v. Crouch , 3 Met. 450	
Earl of Bandon v. Becher , 3 Cl. & F., 510	189,

TABLE OF CASES.

	PAGE
Earp v. Lee, 71 Ill., 194	401
East India Co. v. Syed Ally, VII M. I. A., 535	372 <i>l</i> , 372 <i>o</i>
East Rome Town Co. v. Cothran, 81 Ga., 360	388(<i>Ad.</i>)
Eastern Town Ships Bank v. Beebe, 38 Am. Rep., 665 : 53 Vt., 177	550, 554
Eastmure v. Laws, 5 Bing. N. C., 444	90, 177
Eastwood v. Buel, 1 Ind., 434...	399
Eaton v. Hunt, 20 Ind., 457...	682(<i>Ad.</i>)
Ecker v. First National Bank, 1 Atl. Rep. 849; 64 Md., 292	479
Edgell v. Sigerson, 26 Mo., 583	47
Edgerton v. Edgerton, 33 Am. St. Rep. 557 : 12 Mon., 122	131
Edington v. Pickle, 1 Sneed, 122	372 <i>f</i>
Edmanton v. Lync, 1 Paige, 640	719
Edun v. Bechun, VIII W. R., 175 : II I. J. N. S., 264...	20, 283, 393
Edward v. His Wife, 9 La. Ann., 321	384(<i>Ad.</i>)
Edwards v. Norton, 55 Tex., 405	685(<i>Ad.</i>)
Edwards v. Roys, 18 Vt., 473.	88(<i>Ad.</i>)
Edwards v. Warden, L. R. 9 C. P. 189 : 9 Oh. 495, 1 App. Cas., 281	411
Ehle v. Bingham, 7 Barb., 449	69 (<i>Ad.</i>), 178
Ehrman v. Kendrick, 1 Met., 149	706
Ekram Mundul v. Holodhur, I. L. R., III Cal., 271	60
Ela v. Edwards, 90 Am. Dec. 174 : 13 Allen, 48	199
Ela v. Smith, 66 Am. Dec., 359 : 5 Gray, 135	138
Elahi Baksh v. Sheo Narayan, XVII W. R., 360	112
Eldridge v. Walker, 80 Ill., 270	703
Elgin Watch Co. v. Meyer, 29 Fed. Rep., 225	52 <i>d</i>
Eliot v. McCormick, 144 Mass., 10	373
Eliza Smith v. The Secretary of State for India in Council, I. L. R., III. Cal., 340,	29
Elliott v. Frakes, 71 Ind., 412	181(<i>Ad.</i>)
Elliott v. Hayden, 104 Mass., 180 ..	163, 753, 759
Elliott v. Peirsol, 1 Pet., 340	398, 474
Elliss v. Clarke, 70 Am. Dec. 603 : 19 Ark., 120 ..	114
Ellis v. Smith; 42 Ala., 319	384 (<i>Ad.</i>)
Ellsworth v. Moore, 5 Iowa., 186	414
Elphinstone v. Heerachund, Knapp. P. C. C., 316	372 <i>l</i>
Ely v. Board, 112 Ind., 223...	398, (<i>Ad.</i>)
Ely v. Wilburn, 49 N. J. Law., 685	77
Emam Montazuddin Mahomed v. Rajkoomar Das, XIV B. L. R., 408 ; XXIII	
W. R., 187...	27, 617
Emam-ooddeen v. Futteh Ali, III C. L. R., 147	118
Embree v. Hannu, 5 Johns., 101 ..	516 (<i>Ad.</i>), 603, 682 (<i>Ad.</i>)
Emerie v. Avarado, 64 Cal., 531	166(<i>Ad.</i>)
Emery v. Fowler, 63 Am. Dec. 627 : 39 Me., 326	220
Emery v. Nelson, 9 Serg. & R., 12	287
Emma Silver Mining Co. v. Emma Mining Co., 7 Fed. Rep., 401	219
Empress v. Donnelly. I. L. R., II Cal., 405	383
Emritoll v. Kidd, 2 Hyde, 116, Cor. 46	319, 353
Enaetoolah v. Ameer Buksh, XXV W. R., 225	133
England v. Garner, 90 N. Car., 197...	166, 438(<i>Ad.</i>)
English v. Sprague, 33 Mo., 440	132
Engstrom v. Sherburne, 137 Mass., 153	188
Ennis v. Smith, 14 How., 401	506
Enohin v. Wylie, 10 H. L. C. 1, 15	336, 525
Entrekin v. Chambers, 11 Kan., 368	465
Erwin v. Lowry, 7 How., 172	435
Esptein v. Greer, 85 Ind., 372	661
Essig v. Lower, 120 Ind., 239	483
Estate of Newman, 7 Am. St. Rep., 146 : 75 Cal., 213	476
Estate of White, 37 Cal., 192	386
Estelle v. Peacock, 12 N. W. R., 659 : 48 Mich., 469	160
Estes v. Chicago, 72 Iowa., 235	87
Estes v. Mitchell, 14 Allen., 156	479
Estill v. Taul, 24 Am. Dec. 498 : 2 Verg., 466	64
Evans v. Commonwealth, 34 Am. Dec. 177 : 8 Watts, 398 : 4 Surg. & R., 272	227
Evans v. Kauphans, 59 Pa. St., 379	125
Evans v. Lewis, 1 Wins. Saund. 291 <i>d.</i>	741
Everet v. Frere, I. L. R. VIII Mad., 205 & 206	351, 352

	PAGE
Everling v. Holcomb , 74 Iowa., 722	228
Everts, ex parte , 2 Disney., 33	491
Ewart, Latham & Co. v. Muhammad Siddiq , IV B. H. C. R., 136	
Ewer v. Coffin , 48 Am. Dec. 587; 1 Cush., 23	378
Ewing v. McNairy , 20 Ohio, 322	16
Ewing v. Orr Ewing , 10 Ap. Ca., 453	525
Exchange Bank v. Ault , 102 Ind., 322	
Exchange Bank v. Ford , 3 Pac. R. 449; 7 Cal., 314	744
Faber v. Hovey , 19 Am. Rep. 398; 117 Mass., 108	144, 577
Fabs v. Darling , 82 Ill., 142	4d.)
Fairchild v. Holly , 10 Conn., 475	672
Fairchild v. Lynch , 99 N. Y., 360	
Fakirappa v. Pandurangappa , I. L. R., VI Bom., 7	24, 450, 761
Falkner v. Guild , 10 Wis., 472	425
Falls v. Wright , 29 Am. St. Rep. 74; 55 Ark., 562	453
Farley v. Shippen , Wythe 254; 2 Story's Eq. Jur. Secs. et. Seq., 1290	339
Farmers' Loan and Trust Co. v. Postal Telegraph Co. , 3 Am. St. Rep., 53 55 Conn., 334. 338	
Farmer's National Bank v. Fletcher , 44 Iowa, 253	715(4d.)
Farnham v. Campbell , 16 Paige., 601	719
Farr v. Ladd , 37 Vt. 158	
Farrington v. Payne , 15, Johns. 431	
Fathuma v. Ayissa , M. H. O. Su. Ap. No. 699 of 1883	618
Fatima v. Sakina , I. L. R., 1 All., 52	348
Fatmabai v. Aishabai , I. L. R., XIII Bom. 454 and on appeal I. L. R., XIII Bom. 242	153
Fatteh Khan v. Baz Khan , 1888 P. R., No. 139	191
Fatteh Singh v. Hakim Singh , 1874 P. R., No. 82	189
Faught v. Faught , 98 Ind., 470	37, 128
Fay v. Ames , 44 Barb., 327	226, /
Fazal Shan Khan v. Gafar Khan , I. L. R., XV Mad. 82	569, 580
Feaff v. Hewitt , 59 Am. Dec., 634; 1 Ohio, 511	138(4d.)
Fechheimer v. Washington , 77 Ind., 366	386, 387
Feigley v. Feigley , 61 Am. Dec., 375; 7 Md., 562	635, 724
Fenn v. Harrington , 54 Miss., 733	289, 293
Ferguson v. Crawford , 26 Am. Rep., 589; 70 N. Y., 253	420, 558
Ferguson v. Glaze , 12 La. Ann., 667	226
Ferguson v. Millender , 9 S. E. R. 38; 32 W. Va., 30	451
Ferrall v. Bradford , 50 Am. Dec., 293; 2 Fla., 508	743
Ferrer's Case , 3 Cok. Rep. 271	81
Ferrier's v. Buzick , 6 Iowa., 258	698, 699, 705
Field v. Bennet , 1 Times. L. R. 374; 56 L. J. Q. B., 89	404
Field v. Dortch , 34 Ga., 399	473(4d.)
Field v. Goldsby , 28 Ala., 218	
Field v. Randall , 51 Vt., 33	289
Fields v. Walker , 23 Ala., 155	
Finneran v. Leonard , 83 Am. Dec., 665; 7 Allen., 54	411, 436
First Nat. Bank v. Jaggors , 100 Am. Dec., 53; 31 Md., 38	465, 467
First N. B. v. Piano Co. , 45 Ind., 5... .. .	758
Fish v. Folley , 6 Hill (N. Y.) 54	664
Fisher v. Fisher , 98 Mass., 303	672
Fisher v. Hubbell , 65 Barb., 74	182
Fisk v. Norvel , 58 Am. Dec., 128; 9 Tex., 13	527
Fisk v. Parker , 14 La. Ann., 491	131
Fitch v. Boyer , 51 Tex., 344	430
Fithian v. Morris , 13 Mo., 502	455
Fitzgibbon v. Lake , 81 Am. Dec., 302; 29 Ill., 165	459
Fix v. Sissung , 21 Am. St. Rep., 616; 83 Mich., 561	289
Fleischman v. Walker , 91 Ill., 318	
Fleming v. Johnson , 26 Ark., 421	476
Fleming v. McDonald , 19 Am. Rep., 711; 50 Ind., 278	753, 757
Fleming v. Riddick , 50 Am. Dec., 119; 5 Gratt., 272	737
Fleming v. Seligson , 57 Tex., 52x	408
Fletcher v. Ferrel , 35 Am. Dec., 143; 9 Dana, 272	717

	PAGE
<i>Fletcher v. Holmes</i> , 25 Ind., 458	127, 456
<i>Fletcher v. Jackson</i> , 56 Am. Dec., 98 ; 23 Vt., 581	228, 231 (<i>Ad.</i>)
<i>Fletcher v. Rogers</i> , 27 Eng. W. R., 97	526, 589
<i>Fletcher v. Rylands</i> , 3 H. L., 330	639
<i>Flinn v. Chase</i> , 4 Denio, 90	527
<i>Flint v. Bodge</i> , 10 Allen, 128	180(<i>Ad.</i>)
<i>Folger v. Columbiana Ins. Co.</i> , 99 Mass. 22	238 <i>b</i>
<i>Florentine v. Barton</i> , 2 Wall., 210	436
<i>Floyd v. Browne</i> , 18 Am. Dec., 602 ; 1 Rawle, 121	758
<i>Flood County v. Cheney</i> , 10 N. W. R., 324 ; 57 Iowa, 160	387, 388
<i>Folliott v. Ogden</i> , 1 H. Bl., 135	599
<i>Foot v. Morgan</i> , 1 Hill, 654	385 (<i>Ad.</i>), 386
<i>Footman v. Stetson</i> , 52 Am. Dec., 634 ; 32 Mo., 17	72
<i>Ford v. Doyle</i> , 37 Cal., 346	372
<i>Foreman v. Marianna</i> , 43 Ark., 324	384(<i>Ad.</i>)
<i>Foremen v. Town of Marianna</i> , 43 Ark., 331	384
<i>Forester v. The Secretary of State for India</i> , L. R. I. A. Sup. 10	372 <i>a</i> , 372 <i>s</i>
<i>Foster v. Evans</i> , 51 Mo., 39	152
<i>Foster v. Jones</i> , 23 Ga., 168	166(<i>Ad.</i>)
<i>Foster v. Konkright</i> , 70 Ind., 123	48
<i>Foster v. Richard Busted</i> , 1 Am. Rep., 425 ; 100 Mass., 409	7
<i>Foster v. Vassall</i> , 3 Atk., 589	334
<i>Fowle v. New Haven</i> , 107 Mass., 352	635, 641
<i>Fowle v. New Haven</i> , 112 Mass., 334	635
<i>Fowler v. Bishop</i> , 32 Conn. 199	292, 316(<i>Ad.</i>)
<i>Fowler v. Brooks</i> , 10 Am. St. Rep., 425 ; 13 Atl. R., 417 ; 64 N. H., 423	387, 390
<i>Fowler v. Byers</i> , 16 Ark., 196	386(<i>Ad.</i>)
<i>Fowler v. McDaniel</i> , 6 Heisk., 529	290
<i>Fowler v. Rickerby</i> , 2 M. & G., 700	185
<i>Fox v. Cottage, B. Ass'n</i> , 81 Va., 677	
<i>Fox v. Reader</i> , 28 Ohio, 181	
<i>Foyce v. Patch</i> , 132 Mass., 105	
<i>Framji v. Hormasji</i> , 1 B. H. C. R., O. C., 220	367
<i>Frankel v. Satterfield</i> , 19 Atl. R., 898	398, 411
<i>Frayes v. Worms</i> , 10 C. B. N. S., 149	577
<i>Freeman v. Alderson</i> , 119 U. S., 187	498
<i>Freeman v. Clute</i> , 3 Barb., 424	73
<i>Freeman v. Hawkins</i> , 14 S. W. R., 364 ; 77 Tex., 498	465
<i>Freeman v. Thomson</i> , 50 Hun., 340	327(<i>Ad.</i>)
<i>Freeman v. Howe</i> , 24 How., 450	518, 520
<i>French v. Loyal Co.</i> , 5 Leigh 627	
<i>French v. Neal</i> , 24 Pick., 55	
<i>Frevert v. Swift</i> , 11 Pac. R., 273	
<i>Fries v. Pennsylvania R. R. Co.</i> , 98 Pa. St., 142	737
<i>Frith v. Wollaston</i> , 21 L. J. Ex. 108	577
<i>Fritz Olier v. Lavezzo</i> , I. L. R., X Cal., 878	572
<i>Frog v. Long</i> , 3 Dana, 151	677(<i>Ad.</i>)
<i>Fromlet v. Poor</i> , 29 N. E. R., 108	455
<i>Frost v. Frost</i> , 21 S. C., 501	482
<i>Fulton v. Hanlow</i> , 20 Cal., 450	63
<i>Fulton v. Mathews</i> , 8 Am. Dec., 261 ; 15 Johns., 433	631
<i>Fultz v. Brightwell</i> , 77 Va., 742	463
<i>Furgeson v. Jones</i> , 11 Am. St. Rep., 808 ; 8 Pac. R., 842 ; 17 Or., 204 398(<i>Ad.</i>), 425, 430, 451	
<i>Furneaux v. First Nat. Bank</i> , 7 Am. St. Rep., 541 ; 39 Kan., 141	48
<i>Futteh Singh v. Luchmee Koor</i> , XIII B. L. R., 1 <i>p.</i> 37 ; 21 W. R., 105	111

G

<i>Gagan Chandra Ghosh v. The Empress</i> , I. L. R., VI Cal., 247	238
<i>Gage v. Bulkley</i> , 3 Atk., 214	564
<i>Gage v. Stafford</i> , 1 Ves. Sr., 511	679
<i>Gager v. Doe</i> , 29 Ala., 341	473(<i>Ad.</i>)
<i>Gaillard</i> , 1 Bay.	372 <i>y</i>
<i>Galbes v. Girard</i> , 46 Fed. Rep., 500	372 <i>z</i>
<i>Gaines v. De La Croix</i> , 6 Wall., 720	527

	PAGE
Gaitiara Begam v. Mosita Beg. , XV P. R., 299	59
Galbraith v. Neville , 1 Doug. 5 Note, 5 East, 75	543
Galbreath v. Estes , 38 Ark., 599	685(Ad.)
Gall v. Fryberger , 75 Ind., 98	451
Gallaher v. City of Moundsville , 26 Am. St. Rep., 942 : 34 W. Va., 730 ; .. 12 (Ad.), 49 178, 209	
Galpin v. Page , 18 Wall. 350 ; 1 Saw., 309	377, 425, 430, 432, 463
Galt v. Brigham , 41 Mich. 227	414(Ad.)
Gama v. Amira , 1884 P. R., No. 29... ..	147
Ganapati v. Chathu , I. L. R., XII Mad., 223	305
Ganes Chandra v. Ram Kumar , III B. L. R., A. C. 265 ; XII W. R., 79 ..	616, 647
Ganesh Das v. Secretary of State for India , XVI P. R., 284	356
Ganesh Rai v. Kalka Prasad , I. L. R., V All., 595	122
Gangaraju v. Kondireddi , I. L. R., XVII Mad., 106	277
Gangu Ram v. Gursaran Das , 1887 P. R., No. 31	316
Gansavant v. Narayan Dhond , I. L. R., VII Bom., 467	23, 213
Gardner v. Buckbee , 15 Am. Dec. 256 : 3 Cow , 120	47, 49, 130 (Ad.)
Gardner v. Peekham , 13 R. I., 102	719
Garland v. Garland , 84 Va., 189	199
Garlick v. Dunn , 42 Ala., 404	478(Ad.)
Garner v. State , 28 Kan., 790	483
Garnett v. Macon , 6 Cal., 308	197
Garrett v. Greenwell , 4 S. W. R., 441 ; 92 Mo., 120	114
Garrison v. Babbage Trans. Co. , 94 Mo., 130	232
Garth v. Crawford , Barn., 450	728
Garth v. Ward , 2 Atk., 174	728
Garwood v. Garwood , 29 Cal., 521	37 (Ad.), 158(Ad.)
Gascoigne v. Douglas , Dick, 431	321
Gaskell v. Gaskell , 6 Sim., 643	192(Ad.)
Gaskill v. Dudley , 39 Am. Dec., 750 ; 6 Met., 546	206, 206(Ad.)
Gates v. Preston , 41 N. Y., 113	77, 78
Gates v. State , 128 N. Y., 221	223
Gay, Hardie & Co. v. Brierfield C. & I. Co. , 33 Am. St. Rep., 132 : 94 Ala., 303 ...	517
Gauskha v. Abdul Ropkha , I. L. R., XVII Bom., 162	317
Gayer v. Parker , 8 Am. St. Rep., 227 : 24 Neb., 647	12 (Ad.)
Gear v. Smith , 9 N. H., 63	386(Ad.), 414
Geares v. Campbell , 74 Tex., 576	56(Ad.)
Geiser Threshing Machine Co. v. Farmer , 27 Minn., 428	48, 624
Gelston v. Hoyt , 3 Wheat., 246	524
Gendu v. Govind , X B. H. C. R., 409	351
George v. Cooper , 15 W. Va., 666	684b
Georges v. Hufschmidt , 44 Mo., 179	200(Ad.)
Georgia Railroad and Banking Co. v. Harris , 5 Ga. 527	412
German Bank v. American Fire Insurance Co. , 32 Am. St. Rep., 316 : 83 Iowa, 491. ...	414
Gorvish v. Bragg , 55 Vt., 329	196(Ad.)
Geyer v. Aguilar , 7 T. R., 690	536, 539, 542
Ghursobhit v. Ramdutt , I. L. R., V Cal., 923, VI C. L. R., 537	117
Ghasee Khan v. Kallu , 1 Agra, 152	116
Ghisa v. Runjit , 1880 P. R., No. 121	175
Gholam Husain v. Mahomed Khan , 1877 P. R., No. 56	28
Gibbon v. Dougherty , 10 Ohio., 365	700
Gibbs v. Queen Ins. Co. , 20 Am. Rep. 513	516(Ad.)
Gibson v. Bingham , 5 Am. Rep., 289 : 43 Vt., 410	73, 76(Ad.)
Gibson v. Foster , 2 La. Ann., 503	466
Gibson v. East India Co. , 5 Bing, N. C., 273	372/
Gibson v. Love , 2 Fla., 598	227, 232(Ad.)
Gibson v. Roll , 83 Am. Dec., 181 ; 30 Ill., 172	466
Giffard v. Hort , 1 Sch. L., 407	192
Giffard v. Thorn , 9 N. J. Eq., 702	126
Gilbreath v. Jones , 66 Ala. 129	129
Gilchrist v. Bale , 34 Am. Dec., 469 ; 8 Watts., 355	52
Giles v. Hicks , 45 Ark., 271	455
Giles v. Spinks , 64 Ga., 205	293
Gilman, v. Gilman , 30 Am. Rep. 646. 52 Maine. 165	560
Gill v. United States , 7 Cal. 522	160
Gillit v. Truax , 27 Minn., 528	455

	PAGE
<i>Gilmer v. Grand Rapids</i> , 16 Fed. Rep., 708 ...	406 (<i>Ad.</i>)
<i>Gilmer v. Morris</i> , 35 Fed. Rep., 682; 1 Ch. P., 35; 30 Fed. Rep., 476 ...	12
<i>Ginn v. Rogers</i> , 4 Gill., 131 ...	461 (<i>Ad.</i>)
<i>Gipson v. Ogden</i> , 100 Ind., 20 ...	172
<i>Girardin v. Dean</i> , 49 Tex., 243 ...	12, 179
<i>Girdhar v. Dayabhai</i> , I. L. R., VIII Bom., 174 ...	102
<i>Girdhar v. Kalya</i> , I. L. R., V Bom., 83 ...	265
<i>Girdhar v. Kassigar</i> , I. L. R., XVII Bom., 662 ...	361, 362
<i>Girdhari v. Sheoraj</i> , I. L. R., I All., 431 ...	326
<i>Girish Chunder Ghose v. The Queen-Empress</i> , I. L. R., XX Cal., 857 ...	382
<i>Glass v. Blackwell</i> , 48 Ark., 50; 2 S. W. R., 257 ...	553, 541 (<i>Ad.</i>)
<i>Glenn v. Leggett</i> , 135 U. S., 533 ...	206 (<i>Ad.</i>)
<i>Glide v. Dwyer</i> , 83 Cal., 477 ...	163
<i>Glover v. Stamps</i> , 54 Am. Rep. 870; 73 Ga., 209 ...	56 (<i>Ad.</i>)
<i>Gnanambal v. Parvathi</i> , I. L. R., XV Mad., 477 ...	24, 201
<i>Gnatt v. Insurance Co.</i> , 68 Mo., 503 ...	234
<i>Gobind v. Sadda</i> , XII P. R. 24 (1877) ...	264
<i>Gobind Chunder v. Afzul Rabbani</i> , I. L. R., IX Cal., 426 ...	59
<i>Gobind Chunder v. Guru Churn</i> , I. L. R., XV Cal., 94 ...	701, 715
<i>Gobind Chunder v. Taruck Chunder</i> , I. L. R., III Cal., 145; I C. L. R., 35 ...	59, 177
<i>Gobind Singh v. Kallu</i> , I. L. R., II All., 778 ...	293, 303, 314
<i>Goble v. Dillon</i> , 44 Am. Rep., 308; 86 Ind., 327 ...	78, 84 (<i>Ad.</i>)
<i>Godard v. Gray</i> , 6 Q. B., 139 ...	344, 396, 544, 553, 582, 584
<i>Goebel v. Iffia</i> , 111 N. Y., 170 ...	192
<i>Goit v. Joyce</i> , 61 Ill., 489 ...	401
<i>Gokul Sahu v. Jodu Nundun Roy</i> , I. L. R., XVII Cal., 721 ...	276
<i>Golab Chand v. Prosouno Coomary</i> , XI B. L. R., 332; XX W. R., 86 ...	193
<i>Golam Hossein v. Alla Rukhee</i> , III N. W. P. H. C. R., 62; Agra, F. B. [Ed. 1871.] 248 ...	61
<i>Goldschmidt v. Nobles Co.</i> , 37 Minn., 49 ...	177
<i>Golam Rahman v. Fatima Bibi</i> , I. L. R., XIII Cal., 232 ...	311
<i>Gompertz v. Goldingham</i> , I. L. R., IX Mad., 319 ...	263 (<i>Ad.</i>), 265
<i>Goodnow v. Smith</i> , 97 Mass., 69 ...	237
<i>Goodnow v. Stryker</i> , 62 Iowa, 221 ...	172 (<i>Ad.</i>)
<i>Goodman v. Winter</i> , 64 Ala., 410 ...	443
<i>Goodrich v. Yale</i> , 8 Allen, 451 ...	630 (<i>Ad.</i>)
<i>Goodwin v. Sims</i> , 11 Am. St. Rep. 21; 86 Ala., 102 ...	426, 440, 476
<i>Gooroo Dutt v. Sooroo</i> , XVI W. R., 264 ...	91
<i>Gopal v. Ganeshdas</i> , VIII B. H. C. R., A. C. 97 ...	760
<i>Gopalan v. Valia Tamburatti</i> , I. L. R., VII Mad., 87 ...	214
<i>Gopalayyan v. Raghupati</i> , III M. H. C. R., 217 ...	171
<i>Gopal Chunder v. Kurnodhar</i> , VII W. R., 349 ...	348
<i>Gopal Das v. Gopi Nath</i> , XII C. L. R., 38 ...	179
<i>Gopalrav v. Bhavanrav</i> , 1874 Bom. P. J., 279 ...	471
<i>Goopee Mohun v. Protap Chunder Roy</i> , XI W. R., 530 ...	361
<i>Gopee Kisto Gossamee v. Niloomul</i> , XIII B. L. R., 46; XXII W. R., 79 ...	344
<i>Gopi Nath v. Bhugwat Pershad</i> , I. L. R., X Cal., 697 ...	162, 391, 419
<i>Gopi Wasudev v. Markande</i> , I. L. R., III Bom., 30 ...	189
<i>Gordon v. Gordon</i> , 55 N. H., 399 ...	492
<i>Gore v. Stackpoole</i> , 1 Dow., 31 ...	702
<i>Gooroo Dull v. Sooroo</i> , XVI W. R., 264 ...	91
<i>Gorslett v. Harris</i> , 29 L. T., 75 ...	365
<i>v. Mather</i> , 2 Lams., 283 ...	526
<i>v. Donaldson</i> , 18 B. & Mon., 237 ...	706 (<i>Ad.</i>)
<i>i v. Gorardaulal</i> , I. L. R., XIV Bom., 541 ...	348, 349, 350, 354, 359, 366
<i>Goucher v. Clayton</i> , 34 L. J. Ch. 239; 11 Jur. N. S. 107; 13 Eng. W. R. 336 ...	448
<i>Goudy v. Hall</i> , 30 Ill., 109 ...	445
<i>Gould v. Evansville R. Co.</i> , 91 U. S., 526 ...	
<i>Gould v. Hayes</i> , 91 Ala., 448 ...	518, 6
<i>Gould v. Hendrickson</i> , 96 Ill., 599 ...	684
<i>Gourmoni Dabee v. Jugut Chandra</i> , I. L. R., XVII Cal., 57 ...	115
<i>Gourmonee Dabee v. Read</i> , II Tay & B., 83 ...	713
<i>Govind v. Dhondbarav</i> , I. L. R., XV Bom., 104 ...	394
<i>Gowri Koer v. Audh Koer</i> , I. L. R., X Cal., 1087 ...	31
<i>Goya Pershad v. Tarinee</i> , XXIII W. R., 149 ...	85
<i>Graham v. Boston Ry. Co.</i> , 118 U. S., 161 ...	486
<i>Graham v. Hall</i> , 11 S. & R., 78 ...	622

	PAGE
Graham v. Ingleby, 1 Ex. 651	...
Graham v. Lewis, 22 Q. B. D. 1	...
Graham v. Massey, 23 Ch. D. 743	326, 335
Gramsby v. Ray, 52 N. H. 513	...
Grand Trunk Ry. Co. v. Latham, 63 Me. 177	235
Granger v. Clark, 22 Me. 128	432, 488
Grant v. Bennett, 96 Ill. 513	...
Grant v. Easton, 13 Q. B. D. 302 ; 49 L. T. 645	...
Grant v. Spann, 34 Miss. 294	482
Grantham v. Kennedy, 91 N. R. 148	...
Graves v. Dale, 1 T. R. Mon. 191	...
Graves v. Ewart, 99 Mo. 1	409
Gray v. Douglas, 17 Atl. R. 320 ; 81 Me. 427	466
Gray v. Hawes, 8 Cal. 562	...
Gray v. Larrimore, 2 Abb.(U. S.) 542	...
Gray v. Pingry, 44 Am. Dec. 345 ; 17 Vt. 419	3
Gray v. Stuart, 33 Gratt. 351	402
Greathead v. Bromley, 7 T. R. 455 ; 4 R. R. 490	165
Green, <i>ex parte</i> , 29 Ala. 52	372
Green v. Baskirk, 7 Wall. 139	342
Green v. Clarke, 12 N. Y. 343	... 76, 236
Green v. Green, (1893) P. 92	...
Greene v. Greene, 61 Am. Dec. 454 ; 2 Gray, 361	108
Green v. New River Co., 4 T. R. 589	235
Green v. Rick, 6 Am. St. Rep. 760 ; 121 Pa. St. 130	715, 720
Green v. Sanborn, 150 Mass. 454	...
Green v. White, 7 Blatchf. 242	688
Greenbaum v. Elliott, 60 Mo. 25	72
Greenwood v. Murry, 26 Minn. 259	...
Gregory v. Bovier, 19 Pac. Rep. 232 ; 77 Cal., 121	481
Gregory v. C. C. and C. R. R. Co., 4 Ohio, 675	381
Grogory v. Gregory, 33 N. Y. Sup. Ct. ...	677(Ad.)
Gregory v. Molesworth, 3 Atk. 626	3. 55, 58
Griffin v. Brinkhead, 81 Va. 612	677
Griffin v. Long Island, 102 N. Y. 449	395
Griffin v. McDaniel, 63 Miss. 121	289
Griffith v. Frazier, 8 Cranch, 9	527
Grignon v. Astor, 2 How. 319	...424. 426(Ad.)
Grimbly v. Aykroyd, 1 Exch. 479	654
Grimmett v. Asken, 48 Ark. 151	...
Grish Chunder Roy v. Broughton, I. L. R., XIV Cal., 861	527
Grish Chunder v. Collins, 11 Hyde, 79	365
Grish Chunder v. Ramesuree Dabee, XXII W. R., 308...	621
Grisson v. Reynolds, 1 How (Miss). 570	204
Groat v. Pracht, 31 Kan. 656	125
Grove Street, 61 Cal. 453	441
Gudri Lal v. Jagannath, I. L. R., VIII All., 117...	400
Guard v. Circle, 16 Ind. 401	293
Guernsey v. Carver, 24 Am. Dec. 60 ; 8 Wend. 192	652, 655
Guerrant v. Fowler, 1 Hen. & M. 5	339
Guest v. Brooklyn, 79 N. Y. 624	48, 77
Guinard v. Heysinger, 15 Ill. 288	467
Gulab Chand v. Dhondi, XI B. H. C. R., 64	692, 693
Gulab Rai v. Mangli Lal, I. L. R., VI All., 71	...
Gulabsingji v. Lakshmausingji, I. L. R., XVIII Bom.	311 (Id.)
Gulzari Lal v. Jadam Rai, I L. R., II All., 799	308, 309
Gumani v. Ram Padarath, I. L. R., II All., 838	672
Gunda Mull v. Mulla Mull, VI P. R. 36 ; 1871 P. R. No. 17 Civil.	348
Gungabishen v. Roghoomath, I. L. R., VII Cal., 381	146
Gunghadhur v. Uma Sundery, B. L. R. Sup. Vol. F. B. 672 ; VII W. R. 317 ; II	...
I. J. N. S. 120	50
Gunn v. Howell, 73 Am. Dec. 484 ; 35 Ala., 144	203
Gurusami v. Samurti, I. L. R., V Mad., 37	748
Gunzberg v. Jacobson, 39 Mich. 80	379
Gwin v. McCarroll, 1 Smed. & M. 351	448

TABLE OF CASES.

23

H

PAGE

Hadden v. Sprader, 20 Johns.	553	...	...	...	...	...	719, 723
Haddock v. Perham, 70 Ga.	672	...	...	...	...	...	226c
Hadley v. Green, 2 Tyrw.	390	...	...	...	...	...	89
Hagan v. Lucas, 10 Pet.	400	...	...	...	...	...	518
Hagerman v. Empire Sate Co., 97 Pa. St.	534	...	...	...	...	...	368
Haggin v. Comptoir D'escompte de Paris, 33 Ch. D.	446	...	...	...	...	...	369
Hahn v. Kelly, 94 Am. Dec.	742; 34 Cal.	391	...	...	...	371, 425, 428, 435	
Haight v. Halsey, 3 Wend.	258	...	...	...	...	677(Ad.)	
Hailey v. Ano, 32 Am. St. Rep.	764; 136 N. Y.	569	...	...	...	721	
Hailey v. Boyd, 64 Ala.	399	...	...	...	...	226d	
Haines, ex parte, 9 L. J. N. S.	847...	...	...	...	...	355	
Haines v. Flinn, 18 Am. St. Rep.	785.; 26 Neb.	380	...	...	...	130, 474	
Haines v. Rawson, 2 Am. Rep.	581; 40 Ga.	581	...	...	...	677	
Haji Hasam Ibrahim v. Mancharam, I. L. R., III Bom.,	137	..	..	..	..	91	
Halden v. Scanlin, 30 Vt.	177	...	...	...	...	427	
Hale v. Lawrence, 47 Am. Dec.	190; 1 Zab.	714...	...	...	...	372a	
Hall v. Grogan, 78 Ky.	12	...	...	...	...	717	
Hall v. Hall, 27 W. R. (Eng.)	664	...	...	...	...	117	
Hall v. Hamlin, 2 Watts,	354	...	...	...	...	486	
Hall v. Lanning, 91 U. S.	160	...	...	...	...	379	
Hall v. Mobley, 13 Ga.	318	..	...	...	...	411(Ad.)	
Hall v. Odber, 11 East.,	124...	..	...	...	...	550	
Hall v. Richardson, 22 Hun.	444	...	...	...	...	181	
Hall v. Thayer, 7 Am. Rep.	513; 105 Mass.	219	..	...	...	385, 386	
Hall v. Williams, 17 Am. Dec.	356; 6 Pick.	232	..	...	...	401	
Hall L. C. v. Gustin, 54 Mich.	624	...	...	...	...	695	
Hallock v. Dominy, 69 N. Y.	238	...	...	...	...	159	
Hames v. Orr, 10 Bush.	437	..	...	...	...	705	
Hamidunnissa v. Zohiruddin, I. L. R., XVII Cal.,	670...	...	...	...	...	267	
Hamilton v. Glenn	85 Va.	901	...	...	...	205 (Ad.)	
Hamilton v. Wright, 37 N. Y.	504	...	...	...	...	436	
Hamilton v. Quimby, 46 Ill.	90	...	...	...	...	64	
Hamlet v. Richardson, 9 Bing.	644	...	...	...	...	76	
Hamlyn v. Betteley, 6 Q. B. D.	63	...	...	...	...	414	
Hammett v. Morris, 55 Ga.	644	...	...	...	...	202	
Hammond v. Gordon, 93 Mo.	223	...	...	...	...	435	
Hanchey v. Coskrey, 81 Ala.	149	...	...	...	...	129	
Hancock v. Welsh, 1 Stark,	347	..	...	...	...	158, 220	
Hauham v. Sherman, 114 Mass.	19	...	...	...	...	84(Ad.)	
Hauley v. Donoghue, 43 Am. Rep.	554; 59 Md.	239	...	...	...	92, 622(Ad.)	
Hanna v. Read, 40 Am. Rep.	608; 102 Ill.	596	...	...	...	48, 49, 179	
Haanibal R. R. v. Crane, 102 Ill.	254	...	...	...	...	368	
Hans v. Louisiana, 131 U. S.	I	...	...	...	...	222	
Hans Nielson, 9 S. C. R.	672; 131 U. S.	176	...	...	...	399	
Hanson v. Armstrong, 22 Ill.	442	...	...	...	...	686	
Haramohini v. Dhanmani, I B. L. R., A. C.	138; X W. R.,	62	..	...	...	155	
Harbach v. Des Moines, 80 Iowa.	593	...	...	...	...	642	
Hard v. Shipman, 6 Barb.	621	...	...	...	...	443	
Harden v. Palmerlee, 28 Minn.	450	...	...	...	...	50	
Hardeman v. Battersby, 53 Ga.	36	...	...	...	...	676(Ad.)	
Harding v. Alden, 9 Me.	140	...	...	...	...	532	
Hardy v. Nelson, 27 Me.	525	...	...	...	...	228	
Hare v. Hare, 10 Tex.	355	..	...	...	...	532	
Hargobind v. Bhavany Pershad, VI Cal. S. D. D.,	296...	..	...	...	...	258	
Hargis v. Morse, 7 Kan.	417	...	...	...	...	430	
Hargus v. Goodman, 12 Ind.	629...	...	...	...	...	56(Ad.)	
Hari Bhanji v. Secretary of State for India, I. L. R., IV Mad.,	344	...	...	...	...	357	
Harika Ramayyar v. Tirtasami, I. L. R., VII Mad.,	61	...	...	...	...	276, 277	
Hari Narayan v. Ganpatrav, I. L. R., VII Bom.,	272...	...	...	...	...	67	
Hari Nath v. Mothurmohun, I. L. R., XXI Cal.,	8	..	...	...	...	191 (Ad.)	
Hari Sadashiv v. Shaik Azmudin, I. L. R., XI Bom.,	235	...	...	...	...	372 o	
Harjeebun Doss v. Bhugwan Doss, VII B. L. R., 102; XVI W. R., O. C. 16:							
S. C. On appeal VII B. L. R.,	535						
Harkness v. Hyde, 98 U. S.	476	...	...	...	...	415	
Harlan's Estate, 85 Am. Dec.	58; 24 Cal.,	182	...	...	...	525	

	PAGE
Harmen v. Auditor of Public Accounts, 5 Am. St. Rep. 502 : 123 Ill. 122 ...	176, 208
Harnam v. Gadu, 1889 P. R., No. 81 ...	280
Harnam Singh v. Bhagwan Devi, 1890 P. R., No. 50 ...	300, 309
Harnam Singh v. Kirpa Ram, 1887 P. R., No. 1 ...	299, 302
Harrington v. McColum, 78 Ill. 483 ...	699, 704
Harrington v. People, 6 Barb. 607 ...	443
Harris v. Harris, 1. L. R., 1 Cal., 285 ...	752
Harris v. Harris, 36 Barb. 88 ...	64
Harris v. Johnson, 65 N. Car. 478 ...	677(Ad.)
Harris v. McClanahan, 11 Lea, 181 ...	439
Harris v. Palmore, 74 Ga. 273 ...	
Harris v. Quine, 4 Q. B. 653. ...	
Harris v. Vaughn, 2 Tonn. Ch. 483 ...	61
Harrison v. Lowrie, 49 How. Pr. 124 ...	
Harrison v. McMurray, 71 Tex. 122 ...	408
Harrison v. Stewardson, 2 Hare. 530 ...	210
Harsahai v. Maharaj Singh, 1. L. R., II All. 294 ...	29
Harshey v. Blackmarr, 89 Am. Dec. 520; 20 Iowa, 161 ...	432
Hart v. Hayden, 79 Ky. 346 ...	717
Hart v. Marshall, 4 Minn. 294 ...	712
Hart v. Sansom, 110 U. S. 151 ...	373, 376, 594, 622 (Ad.)
Hart v. Waitt, 3 Allen, 532 ...	405
Harvey v. Farnie, 8 Ap. Ca. 43 ...	530
Harvey v. Foster, 64 Cal. 296 ...	473, 483
Harvey v. Osborn, 55 Ind. 535 ...	172(Ad.)
Harvey v. Tyler, 2 Wall. 328 ...	474(Ad.)
Hasam Ibrahim v. Mancharam, 1. L. R., III., Bom., 137 ...	11
Hass v. Taylor, 80 Ala. 459 ...	121
Hassal v. Wilcox, 9. S. C. R. 590, 130 U. S. 493 ...	494
Hassanbhoy v. Cowasji Jehangir, 1. L. R., VII Bom. 1 ...	321
Hatch v. Coddington, 19 N. W. R. 393; 32 Minn. 92 ...	50
Hatch v. Spofford, 22 Conn. 485 ...	682(Ad.)
Hatchell v. Berney, 65 Ala. 39 ...	200(Ad.)
Hathaway v. Hemmingway, 20 Conn. 191 ...	476
Havemeyer v. Superior Court, 18 Am. St. Rep. 192; 84 Cal. 327 ...	728
Haven v. Adams, 8 Allen, 363 ...	711
Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385 ...	205
Hawes v. C. C. Water Co., 5 Saw. 287 : 7 Reporter, 100 ...	150
Hawes v. Orr, 10 Bush, 437 ...	723
Hawkins v. Glenn, 9 Sup. Ct. R. 739, 131 U. S. 319 ...	206
Hawkins v. McDougal, 25 N. E. R. 820; 126 Ind. 539... ..	466
Hawks v. Truesdell, 99 Mass. 557 ...	138
Hayat v. Sant Ram, 1894 P. R. No. 20 ...	302 (Ad.)
Hayden v. Bucklin, 9 Paige, 513 ...	695, 704
Hayes v. Bickelhaupt, 24 Fed. Rep. 806 ...	219
Hayes v. Nourse, 11 Am. St. Rep. 700; 114 N. Y. 595 ...	704
Hayes v. Seaver, 7 Me. 239 ...	226
Haynes v. Ordway, 52 N. H. 284 ...	144
Hays Adm. v. McNealy, 16 Fla. 409 ...	287 (Ad.)
Hazara Singh v. Lal Singh, 1891 P. R., No. 63 ...	292
Hazir Gazi v. Sonamonee Dasse, 1. L. R., VI Cal. 31 ...	212, 213
Head v. Daniels, 15 Pac. R. 911; 38 Kan. 1 ...	451, 458, 483
Heard v. Lodge, 32 Am. Dec. 197; 20 Pick. 53 ...	226b, 226c, 227
Heard v. Sack, 81 Mo. 610 ...	167
Heck v. Martin, 16 Am. St. Rep. 915; 75 Tex. 469 ...	427, 446
Hedgecock v. Davis, 64 N. Car. 650 ...	316 (Ad.)
Heera Monee v. Promothonath, VIII W. R., 32 ...	571
Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294... ..	516(Ad.), 521
Heir of Ludlow v. Kidd, 3 Ohio. 541 ...	702, 703
Heiser v. Hatch, 86 N. Y. 614 ...	234
Helms v. Chadbourne, 45 Wis. 60 ...	414(Ad.)
Hemendro Coomar v. Rajendrolal, 1. L. R., III Cal., 363 per Markby J. ...	746, 747
Hemmens v. Bentley, 32 Mich. 89 ...	479
Hemmenway v. Hickes, 4 Pick. 497 ...	292(Ad.), 313
Henderson v. Henderson, 3 Hare, 115 ...	18, 64, 89

	PAGE
Henderson v. Henderson, 6 Ad. & El. N. S. 298; 11 Q. B. 1015; 13 L.J.Q.B. 274.	540, 585
Henderson v. Stanford, 7 Am. Rep. 551; 105 Mass. 504	375
Hentig v. Redden, 26 Am. St. Rep. 91; 46 Kan. 231	88(Ad.), 107
Hepburn v. Sewell, 9 Am. Dec. 512; 5 Har. & J. 211	759
Herndon v. Hawkins, 65 Mo. 265	481
Herring v. Adams, 5 W. & S. 459	69(Ad.)
Herrington v. Herrington, 27 Mo. 560	698, 704
Herrington v. McCollum, 73 Ill. 476	699
Hersey v. Benedict, 15 Hun. 282	526
Hersey v. Long, 30 Minn. 114	233
Hessel v. Johnson, 124 Pa. St. 233	200
Het Ball Roy, In re, XXII W. R., Cr. 75	383
Hibernia Savings Society v. Superior Court, 56 Cal. 265	202
Hickerson v. City of Mexico, 58 Mo. 61	136
Hicks v. Gooch, 93 N. Car. 281	138(Ad.)
Hiern v. Mill, 13 Ves. 120	136
Higgins, 2 De. G. & J. 33	744
Higgins v. Shaw, 2 Dr. and War, 361	696
Hightower v. Williams, 38 Ga. 597	444
Hikmatulla v. Imam Ali, I. L. R., XII All., 203	614, 657
Hill v. Bain, 2 Am. St. Rep. 873; 15 R. I., 75	159
Hill v. Meudenhall, 21 Wall. 453	438
Hill v. Tucker, 13 How. 458	199
Hills v. M. Rae, 9 Hare, 397	745
Hills v. Miles, 13 Wis. 625	473(Ad.)
Hillsborough v. Nichols, 46 N. H. 379	486
Hilton v. Guyott, 42 Fed. Rep. 249	489, 543, 589, 595
Himmelmann v. Sullivan, 40 Cal. 125	51
Hinde v. Ponnath Brayan, I. L. R., IV Mad., 359	566
Hind v. Gage, 56 Cal. 486	139
Hind v. Willis, 13 S. & R. 238	461(Ad.)
Hines v. Rawson, 2 Am. Rep. 581; 40 Ga. 356	528
Hitchin v. Campbell, 2 W. Bl. 826	12, 52d, 89
Hite v. Long, 18 Am. Dec. 719; 6 Band. 457	638
Hobart v. Frost, 5 Duer. 672	411
Hobby v. Bunch, 20 Am. St. Rep. 301; 83 Cal. 1	72(Ad.), 444
Hodgson, 31 Ch. D. 177	743
Hodoll v. Staltebrass, 11 Ad. & El. 301	635
Hoffield v. Board, &c., 33 Kan. 644	467
Hoffman v. Hoffman, 7 Am. Rep. 299; 46 N. Y. 30	375
Hoffman v. Conner, 76 N. Y. 121	717
Holbert's Estate, 57 Cal. 257	138
Holbert v. Montgomery's Adm'r, 5 Dana, II....	436
Holden v. Lathrop, 32 N. W. R. 879; 65 Mich. 652	427, 482
Holkar v. Dadabhai, I. L. R. XIV Bom., 353	320
Holladay Case, 27 Fed. Rep. 830	519
Hollister v. Abbott, 64 Am. Dec. 342; 31 N. H. 442	474
Hollis v. Dashiell, 52 Tex. 187	402
Hollingsworth v. Bagley, 35 Tex. 345	398
Hollingsworth v. State, 12 N. E. R. 490; 111 Ind. 289	465
Holmes v. Eason, 8 Lea, 760	399
Holmes v. Buckner, 67 Tex. 107	427
Holmes v. Oregon & Cal. R. Co., 7 Sawy. 380	516(Ad.)
Holmes v. Wilson, 10 Ad. & E. 511	752
Holton v. Towner, 61 Mo. 360	402, 403
Holyoke v. Haskins, 16 Am. Dec. 372; 5 Pick. 20	527
Home Ins. Co., v. Morse, 20 Wall. 451	405
Homer v. Fish, 11 Am. Dec. 218; 1 Pick. 435	486
Homeyer v. Lushington, 7 T.R. 325	512
Hood v. Hood, 110 Mass. 463	506
Hooker v. Hubbard, 102 Mass. 239	129(Ad.)
Hope v. Alley, II Tex. 259	677(Ad.)
Hope v. Blair, 24 Am. St. Rep. 366; 105 Miss. 85	240, 483
Hooper v. Hooper, 9 S. E. R. 937	198
Hoose v. Sherrill, 16 Wend. 33	466

	PAGE
Hurruck Chand v. Khoshal Chand , Borr. 38 264	264
Hurry Behari v. Paigun , 1. L. R., XIX Cal. 656 115, 134	115, 134
Huxley v. Harold , 62 Mo. 516 135	135
Hyman v. Coleman , 16 Am. St. Rep. 178 ; 82 Cal. 650 287	287
Hymes v. Estey , 15 Am. St. Rep. 421 ; 116 N. Y. 501 130 (<i>Id.</i>)	130 (<i>Id.</i>)
Ibrayan v. Komamutti , 1. L. R., XV. Mad., 1 501 305	305
Imdad Ali v. Boonyad Ali , XIV W. R. 92 643	643
Imlay v. Ellefsen , 2 East. 453 682	682
Imrie v. Castrique , 8 C. B. N. S. 105 608	608
Imrit Kooer v. Lebee Pershad , XVIII W. R. 200 204	204
Inayat Khan v. Rahmat Bibi , 1. L. R., II All., 97 60	60
Indarjit Prasad v. Richha Rai , 1. L. R., XV All., 3 134, 148, 149	134, 148, 149
Indiana B. & W. Ry. Co. v. Allen , 3 Am. St. Rep. 650 ; 113 Ind. 308 484	484
Indiana v. Koons , 105 Ind. 507 664	664
Ingate v. Austrian Lloyds , 4 C. B. (N. S.) 704 370	370
Inhabitants v. Weir 9 Ind. 224 316 (<i>Ad.</i>)	316 (<i>Ad.</i>)
Inhabitants of Lower Alloways Creek v. Moore , 15 N. J. Law 116 223	223
Inhabitants of Township No. 11 v. Weir , 9 Ind. 224 293	293
Inhabitants of North Hampton v. Smith , 11 Met. 395 384	384
Inloe v. Harvey , 11 Md. 524 684 <i>b</i>	684 <i>b</i>
Inman v. Mead , 97 Mass. 310 237	237
Inslce v. Hampton , 11 Hun. 156 623	623
Insurance Co. v. Brune , 96 U. S. 588 682	682
Insurance Co. v. French , 18 How. 404 375	375
Iowa Co. v. Mineral Point R. Co. 24 Wis. 14 129 (<i>Ad.</i>)	129 (<i>Ad.</i>)
Iron v. Keystone Mfg. Co. , 16 N. W. R. 349 ; 61 Iowa, 406 466	466
Irwin v. Backus , 85 Am. Dec. 125 ; 25 Cal. 214... .. 226, 227, 515 (<i>Id.</i>)	226, 227, 515 (<i>Id.</i>)
Irwin v. Scriber , 18 Cal. 507 516 (<i>Id.</i>)	516 (<i>Id.</i>)
Isler v. Brown , 66 N. C. 556 726	726
Isqueredo v. Forbes , 424 Geo. 3, B. R. 543	543
Ittiacham v. Velappan , 1. L. R., VIII Mad., 484 215	215
Ives v. Salisbury , 56 Vt. 565 516 (<i>Ad.</i>)	516 (<i>Ad.</i>)
Jack v. Hudnall , 18 Am. Rep. 298 ; 25 Ohio St. 255	
Jacks v. Moore , 33 Ark. 31 11	11
<i>v. Colver</i> , 1 Wend. 488 67	67
<i>v. Griswold</i> , 4 Hill, 522... ..	
<i>v. Lodge</i> , 36 Cal. 31 10	10
Jackson v. Petrie , 10 Ves. 164 ; 7 R. R. 368 334	334
Jackson v. Spittall , 1. R. 5 C. P. 542 344, 372 <i>v</i>	344, 372 <i>v</i>
Jackson v. State , 3 N. E. R. 863 ; 104 Ind. 516 435	435
Jackson v. Whitfield , 51 Miss. 202 316 (<i>Ad.</i>)	316 (<i>Ad.</i>)
Jacobs v. Frere , 28 La. Ann. 625... .. 495	495
Jacobs v. Hull , 12 Mass. 24 557	557
Jacobson v. Campbell , Sup. Ct. Ark. Jan. 11, 1890 409	409
Jacobson v. Miller , 41 Mich. 900 ; 1 N. W. R. 1013 49, 64	49, 64
Jacomb v. Harwood , 2 Ves. Sen. 65 745	745
Jadu Lal v. Ram Gholam , 1. L. R. 1 All. pp. 76 & 316 68	68
Jagatjit Singh v. Sarabjit Singh , 1. R. XVIII I. A. 165 ; 1. L. R., XIX. Cal. 159	159
... .. 117, 134	117, 134
Jag Lal v. Har Narain Singh , 1. L. R., X All., 524 295, 314	295, 314
Jamait-un-nissa v. Lutfunnissa , 1. L. R., VII All., 606 14, 24, 133, 148	14, 24, 133, 148
James v. Campbell , 104 U. S. 356 222	222
James v. Cattherwood , 3 D. & R. 190 599	599
Jamnadas v. Bai Shivkor , 1. L. R., V Bom., 572 298	298
Jamna Singh v. Kamrunissa , 1. L. R., III All., 152 171	171

	PAGE
Jania v. Hulia , 1873 P. J. 170	393
Jansen v. Grimshaw , 125 Ill. 468... ..	744
Jansen v. Varnum , 89 Ill. 100	401
Jardine Skinner & Co. v. Shama Soondaree , XIII W. R., 196	644
Jarvis v. Driggs , 69 N. Y. 143	84(Ad.)
Jasper County v. Wadlow , 82 Mo. 172	465
Jeebraj Singh v. Inderjoot Mahton , XII B. L. R. 115 (n): XVIII W. R., 109	310
Jeffres v. Cochrane , 48 N. Y. 671	718
Jehan v. Saivak Ram , 1 Agra, F. B. 109	648
Jenkins v. Robertson , L. R. 1 H. L. 117 Sc. Ap.	126
Jennings v. Simpson , 11 N. W. Rep. 580 12 Neb. 558... ..	408
Jeo Lal Singh v. Surfun , XI C. L. R., 483	115
Jerome v. McCarter , 94 U. S. 734	686
Jeter v. Hewitt , 22 How. 352; per Campbell, J.	7
Jewett v. Petit , 4 Mich. 508	526
Jex v. Jacob , 19 Hun, 105... ..	661
Jharoo v. Raj Chunder , I. L. R., XII Cal., 299	715
Jiban Das v. Durga Persad , I. L. R., XXI Cal., 252	154 (Ad.), 252 (Id.)
Jibunti Nath v. Shib Nath , I. L. R., VIII Cal., 819	627, 670, 672
Jijaji Pratappi v. Balkrishna , I. L. R., XVII Bom., 169	450
Jit Singh v. Mutu Shah , 1889 P. R., No. 69	395
Jochumson v. Suffolk Savings Bank , 3 Allen, 87	327
Jogal Kishor v. Tale Singh , I. L. R., IV All., 320	301
Jogendro Deb v. Funindro Deb , XIV M. L. A. 367; XI B. L. R., 214: XVII W. R., 104	211, 509
Jogendro Nundina v. Hurry Doss , I. L. R., V Cal., 500	267
Johnson v. Beazley , 27 Am. Rep. 276; 65 Miss. 250	427
Johnson v. Iron Belt Min. Co. , 47 N. W. R. 363; 78 Wis. 159	400
Johnson v. Jones , 2 Neb. 126	460
Johnson v. Murphy , 17 Tex. 216	152
Johnson v. Pacific Cement Co. , 50 Cal. 648	478(Ad.)
Johnson v. Pomeroy , 31 Ohio. 247	166 (Ad.)
Johnson v. Wright , 27 Ga. 555	418
Johnston v. San Francisco S. U. , 77 Am. St. Rep. 129; 75 Cal. 134	158, 483
Joiner v. Winston , 68 Ala. 129	42(Ad.)
Jolly v. Foltz , 34 Cal. 321	432
Jones v. Brown , 54 Iowa. 74	238a
Jones v. Clark , 42 Cal. 180	140
Jones v. Commercial Bank , 78 Ky. 413	169
Jones v. Davenport , 17 Atl. R. 570; 40 N. J. Eq. 77	453
Jones v. Jones , 2 Am. St. Rep. 451; 108 N. Y. 115	371, 415, 535
Jones v. Lowell , 35 Mo. 541	753
Jones v. McNarrin , 28 Am. Rep. 66; 68 Maine, 334	729
Jones v. Pashley , 48 Mich. 634	160
Jones v. Read , 1 Humph. 334	425
Jones v. Teacey , 75 Pa. St. 417	202
Jones v. Vert , 16 Am. St. Rep. 379; 121 Ind. 140	172
Jones v. Zahra Mal , 1889 P. R., No. 66	390, 404, 580, 581, 586, 591
Jonmenjoy Mullick v. Doz Somoney Dossee , I. L. R., VII Cal., 714	672
Jordan v. Siefert , 126 Mass. 25	113(Ad.)
Jordan v. Van Epps , 85 N. Y. 427	64 (Ad.)
Joseph v. Henry , 15 Jur. 104, 19 L. J. Q. B. 369; 1 L. M. & P. 388	291
Jowahir v. Bhaga , 1857 Cal. S. D. 362	257, 258
Joychunder v. Ramchurn , VI W. R., 323	264 (Ad.)
Joyce v. McAvoy , 89 Am. Dec. 172; 31 Cal. 273	164(Ad.)
Joyce v. Moore , 10 Mo. 271	660
Joyce v. Whitney , 57 Ind. 550	177(Ad.)
Joynath Roy v. Lall Bahadoor Singh , I. L. R., VIII Cal., 126	307
Judge of Probate v. Robins , 5 N. H. 246	482
Jugger Nauth v. Brijnath , I. L. R., IV Cal., 322	320
Juggodumba v. Puddomoney , XV B. L. R., 318	319
Juggodumba Dossee v. Tarakant , VI C. L. R., 127	764
Juggut Chunder v. Kishwanund , II Beng. S. D. A. Sel. Rep. 160	193
Jumoona Dassee v. Bamaseonderee , II W. R., 148	621, 645
Jwala Prasad v. Salig Ram , I. L. R., XIII All. 575	461

	K	PAGE
Kachar Ala Chela v. Aghadbhai, I. L. R., XVII Bom., 35	...	135
Kadamburi Dasi v. Dorrga Churn, Marsh, 4; 1 Hay, 25	...	409
Kailas Chandra Ghose v. Fulchand, VIII B. L. R. 474	...	689
Kaka v. Bhola, 1881 P. R., No. 96	...	66
Kakaji Ranoji v. Bapuji Madhavrav, VIII B. H. C. R., A. C. 205	...	121
Kakarlapudi Suriyanarayanarazu v. Chellamkuri, V M. H. C. R., 176	...	144
Kalee Coomar Dutt v. Pran Kishoree, XVIII W. R., 29	...	167
Kali Churan v. Ajudhia Rai, I. L. R., II All., 148	...	300
Kali Das v. Vallabhdas, I. L. R., VI Bom., 79	...	298
Kalidhun v. Shiba Nath, I. L. R., VIII Cal., 483; XI C. L. R., 57	...	617, 671
Kali Krishna Tagore v. Secretary of State for India, L. R. XV I. A. 186; I. L. R. XVI Cal. 173	...	114 (Ad.), 133
Kalishunkur Doss v. Gopal Chunder Dutt, I. L. R., VI Cal., 49; VI C. L. R., 543	...	217
Kamaraju v. The Secretary of State for India, I. L. R., XI Mad., 309	...	164
Kameswar Pershad v. Ruttun Koer, L. R. XIX I. A., 238; I. L. R., XX Cal., 79	...	22, 104
Kamini Kant Roy v. Ram Nath, I. L. R., XXI Cal., 265	...	153 (Ad.)
Kanai Lal v. Sashi Bhuson, I. L. R., VI Cal., 777	...	119
Kandasami Pillai v. Moidin Saib, I. L. R., II Mad., 337	...	571
Kandoth Mammi v. Neelan Cherayil, VIII M. H. C. R., 14	...	568, 571
Kane v. Cook, 8 Cal. 455	...	557
Kane v. Fisher, 2 Watts, 246	...	48
Kane v. Morehouse, 46 Conn. 300	...	619
Kanhya Lal v. Alla Ditta, 1888 P. R., No. 97	...	280
Kanhya Lall v. Radha Churn, VII W. R., 338; B. L. R. Sup. Vol. 662; II I. J. N. S. 229	...	503, 508, 510
Kanji Bavla v. Arjun, I. L. R., XVIII Bom., 115	...	264 (Ad.)
Kannan v. Tenju, I. L. R., V Mad., 1	...	648
Kansas City R. Co. v. Rodebaugh, 5 Am. St. Rep. 715; 38 Kan. 45	...	412
Kartick Chandra v. Sridhar Mandal, I. L. R., XII Cal., 563	...	124
Karr v. Barstow, 24 Ill. 480	...	731
Karr v. Parks, 44 Cal. 46	...	180 (Ad.), 635
Karappa Goundan v. Kolanthayan, I. L. R., VII Mad., 91	...	248
Kashee Kishore v. Kristo Chunder, XXII W. R., 464	...	96
Katama Natichiar v. Rajah of Shivagunga, IX M. I. A. 543; II W. R., P. C. 31	...	95, 190, 191 (Ad.) 507
Kateeram v. Gendhenee, XXII W. R., 178	...	267
Kauff v. Messner, 4 Brewst. 98	...	86
Kavasji Framji v. Wallace, I B. H. C. R., 113	...	350
Keating v. Spink, 62 Am. Dec. 214; 3 Ohio. 105	...	523, 677
Kelley v. Stanbery, 13 Ohio, 408	...	136
Kellie v. Fraser, I. L. R., II Cal., 445	...	319
Kellog, ex parte, 6 Vt. 511	...	466
Kellog, v. Denslow, 14 Conn. 120	...	76 (Ad.)
Kellogg v. Faucher, 99 Am. Dec. 96; 23 Wis. 21	...	717
Kelly v. Mize, 3 Sneed, 61	...	475
Kelloy v. Denslow, 14 Conn. 426	...	76 (Ad.)
Kelsey v. Ward, 38 N. Y. 83	...	49
Kemp's Lessee v. Kennedy, 5 Cranch, 173	...	426
Kempker v. Comer, 73 Tex. 196	...	672
Kendall v. Hamilton, 4 App. Cas. 504	...	165, 739
Kennard v. Carter, 64 Ind. 31	...	743
Kennedy v. Adams, 11 B. Mon. 105	...	696
Kennedy v. Cassilis, 2 Swanst. 326 (n)	...	512
Kennedy v. New York Insurance and Trust Co., 5 N. E. R. 774; 101 N. Y. 487	...	467
Kenney v. Greer, 13 Ill. 432	...	412 (Ad.)
Kent v. Church of St. Michael, 32 Am. St. Rep. 693	...	192 (Ad.)
Kent v. Hudson River R. Co., 22 Barb. 278	...	235
Kent v. Lasley, 48 Wis. 257	...	200 (Ad.)
Keckuk v. Alexander, 21 Iowa, 377	...	152, 620
Keramatula v. Ghulam Hosein, IX W. R. 77
Kern Valley Water Co. v. McCord, 70 Cal., 640	...	388
Kerr v. Blodgett, 48 N. Y. 66	...	210
Kerr v. Haynes, 29 L. J. Q. B. 70	...	349, 35
Kerr v. Kerr, 41 N. Y. 272	...	375, 138, 557, 558
Kerr v. Simmons, 9 Mo. App. 376
Kesar Singh v. Jawand Singh, 1884 P. R., No. 142

	PAGE
Kesar Singh v. Nihal Singh, 1891 P. R., No. 45	274
Keshava v. Rudran, I. L. R., V Mad., 259	127
Keshava Sanabhaga v. Lakshminarayana, I. L. R., VI Mad., 192	307
Kessowji v. Khimji, I. L. R., XII Bom., 507	361, 363
Ketchum v. Thatcher, 12 Mo. Ap. 185	144
Kevan v. Crawford, 6 Ch. D. 29	175
Keynsham Blue Lime Co. v. Baker, 2 H. & C. 729	267
Keyser v. Southerland, 59 Mich., 45	36(Ad.)
Khandu v. Tatia, VIII B. H. C. R. A. C. 23	297
Kharisa Bibi v. Syed Abba, I. L. R., XI Mad., 149	315
Khedaroonissa v. Boodhee, XIII W. R. 317	667
Khelut Chunder v. Kishen Gobind, XVI W. R. 128	171
Khemna v. Budoloo, I. L. R., VI Cal., 251 ; VII C. L. R. 92 ..	172
Khimji v. Forbes, VIII B. H. C. R. O. C. 102	361
Khub Chand v. Narain Singh, I. L. R., III All., 812	162
Khugowlie Singh v. Hussein Bux, VII B. L. R. 673	6
Khushalchand v. Nagindos, I. L. R., XII Bom., 675	311(Ad.)
Kibbe v. Kibbe, Kirby, 126	557
Kidd v. Laird, 76 Am. Dec. 472 ; 15 Cal. 161 ..	60
Kilandar v. Hoover, 111 Ind. 10	47
Kildare v. Eustace, 1 Vern. 419	
Kimball v. Fisk, 75 Am. Dec. 213 ; 39 N. H. 110	127
Kimpton v. Willey, 1 L. M. & P. 280	
Kindell v. Titus, 9 Heisk, 727	
King v. Bates, 20 Am. St. Rep. 518 ; 80 Mich. 367	132
King v. Boston, 7 East, 481(n)	625
King v. Chase, 41 Am. Dec. 675 ; 15 N. H. 9	35, 220
King v. Davis, 85 Ind. 309	466
King v. Grimes, Bullers N. P., 231	194 (Ad.)
King v. Hoare, 13 M. & W. 494	755, 736
King v. Norman, 4 C. B. 884	226, 238
King (The) v. Lee Fook, 7 Hawaiian Rep. 249 ..	238 b
King v. Pool, 36 Barb. 242	400
King v. Sapp, 2 S. W. R. 573 ; 66 Tex. 519	389
King v. Vance, 46 Ind. 246	202, 203
Kingsbury v. Yniestra, 59 Ala. 520	558
Kingley v. Davis, 104 Mass., 178	743
Kintock v. Secretary of State for India in Council, 15 Ch. D. 8	358
Kimmersley v. Orpe, 2 Doug. 517	158
Kinney v. Kiernan, 2 Lans. 492	52 b
Kinsman v. Kinsman, 1 Russ. & M. 622	696, 705
Kipp v. Fullerton, 4 Minn. 473 (Gil. 366)	446
Kirby v. Fitzgerald, 31 N. Y. 417	127 (Ad.)
Kirkland v. Brown, 40 Am. Dec. 635 ; 4 Humph. 174 ..	72
Kisan v. Anandram, X B. H. C. R., 433... ..	21
Kishan Sahai v. Aladad Khan, I. L. R., XIV All., 64... ..	34, 761
Kishen Bullub v. Roghoonundun, VI W. R., 305	192
Kishna Ram v. Hingu Lal, I. L. R., IV All., 237	461
Kisononund v. Nursingh Doss, 1 Marsh, 485	193
Kissun Singh v. Sturt, V M. H. C. R., 471	319
Kitchens v. Hutchins, 11 Ga. 620	102
Kittredge v. Holt, 58 N. H. 191	
Kleiber v. People's Ry. Co., 107 Mo. 240	404
Klink v. Str. Casseta, 30 Ga., 504	138(Ad.)
Knapp v. Marlboro, 31 Vt. 235	228
Knef v. Morell, 13 N. E. R. 51 ; 111 Ind. 570	454
Knorr v. Peerless Reaper Co., 8 Am. St. Rep. 140 ; 23 Neb. 636	623
Knott v. Taylor, 6 Am. St. Rep. 547 ; 99 N. C. 511	408
Knowles v. Gashght Co., 19 Wall. 58	558
Knowlton v. N. Y. and N. E. R. Co., 147 Mass. 606	52, 632
Kodiyalam Rungasami v. Sudersana, XI M. J. 422	214
Koger v. Franklin, 79 Ala. 505	387
Komola Ramine Debia v. Loke Nath, I. L. R., VIII Cal., 825 (... XI C. L. R. 183	670
Konerrav v. Gurav, I. L. R., V Bom., 589	102
Konitzky v. Meyer, 49 N. Y. 571	583
Koon v. Mallett, 68 Iowa, 205	128

TABLE OF CASES.

31

	PAGE
Koonj Behari <i>v.</i> Ram Narain, II Agra, 244	322
Kour Sein <i>v.</i> Samére, VIII P. R. 104 (1878)	165
Koylash Chunder <i>v.</i> Ashruf Ali, XXII W. R., 101	420
Kramer <i>v.</i> Holster, 55 Miss. 243	398
Kramph <i>v.</i> Hatz, 52 Pa. St. 529	231 (<i>Ad.</i>)
Krapp <i>v.</i> Eldridge, 33 Kan. 106	114 (<i>Ad.</i>)
Krebaum <i>v.</i> Cordell, 63 Ill. 24	687 (<i>Ad.</i>)
Krekeler <i>v.</i> Ritter, 62 N. Y. 572	488
Krishna <i>v.</i> Anantarama, II M. H. C. R., 330	257
Krishnam <i>v.</i> Anant, IV Morr. 3	256
Krishna Behary Roy <i>v.</i> Brojeswari, L. R. II I. A., 283 ; <i>v.</i> Bunwarilal, I L. R., 1 Cal., 144 : XXV. W. R. 1	6 11, 133, 149
Krishnaji <i>v.</i> Sitaram, I. L. R., V Bom., 496	251
Krishnama <i>v.</i> Srinivasa, I. L. R., IV Mad., 339	308
Krishnappa <i>v.</i> Bahiru, VIII B. H. C. R., A. C. 55	689, 693
Krishnasami <i>v.</i> Kanka Sabai, I. L. R., XIV Mad., 183	287, 305, 421
Krishnasami <i>v.</i> Krishnama, I. L. R., V Mad., 313	252, 255
Kristna Row <i>v.</i> Hachapa, II M. H. C. R., 307	322
Kristo Kinkur <i>v.</i> Ram Dhun, XXIV W. R., 326	663
Kronprinz <i>v.</i> Kronprinz, 12 App. Ca. 256	126
Kronshage <i>v.</i> Chicago, M. and St. P. R. Co., 45 Wis. 500	180 (<i>Ad.</i>)
Krus <i>v.</i> Wilson, 79 Ill. 233	442 (<i>Ad.</i>), 460
Kuchenbeiser <i>v.</i> Beckert, 41 Ill. 172	164 (<i>Ad.</i>)
Kudrat <i>v.</i> Dinu, I. L. R., IX All., 155	122
Kuchling <i>v.</i> Loberman, 2 W. N. Cas. 616	605
Kulceemooddeen <i>v.</i> Sona Chund, 1848 Beng. S. D. A. D. 795	266
Kunhi Raman <i>v.</i> Puttalathu, I. L. R., IV Mad., 311	311
Kunhi Kuttusu <i>v.</i> Kunhyau Kutti, III I. J. 13	92
Kunha <i>v.</i> Mohidin, I. L. R., XI Mad., 327	267
Kunhi Anna <i>v.</i> Raman Menon, I. L. R., XV Mad., 494	45, 391, 395
ck Chunder <i>v.</i> Guru Dass, I. L. R., IX Cal., 919, XII C. L. R. 599	668
Chetti <i>v.</i> Chidambara III M. H. C. R., 170	290

Lachman <i>v.</i> Lahar, X P. R., 178 ; 1875 P. R., No. 70	43
Lacroix <i>v.</i> Lyons, 33 Fed. Rep. 437	161
Ladd <i>v.</i> Durkin, 54 Cal. 395	197
Ladd Begum <i>v.</i> Raja Rabia, I. L. R., XIII Bom., 650	410
Lafayette Insurance Co. <i>v.</i> French, 18 How. 401	467
Lafferty <i>v.</i> Day, 7 Ark. 258	293
Lakshman Bhatkar <i>v.</i> Babaji Bhatkar, I. L. R., VIII Bom., 31	288, 299, 304
Lal Shree Das <i>v.</i> Dasrat, I. L. R., VI Bom., 168	692, 693
Lal Kuli Prasad <i>v.</i> Buli Singh, I. L. R., IV Cal. 789, III C. L. R., 396	715
Lala M.aji <i>v.</i> Kashibai, I. L. R., X Bom. 400	713
Lamer Ins. Co. <i>v.</i> Gulick, 102 Ill. 41	205 (<i>Ad.</i>)
Lamer <i>v.</i> Knott, 74 Ga. 379	56 (<i>Ad.</i>)
Lamb <i>v.</i> Smith, 15 L. J. Ex. 207	318
Lamb <i>v.</i> Walker, 3 Q. B. D. 389	638
Lammon <i>v.</i> Fousier, 111 U. S. 17	720
Lamp <i>v.</i> Manning, 38 Wis. 673	479
Lamprey <i>v.</i> Nudd, 29 N. H. 299	167
Lancaster <i>v.</i> Wilson, 27 Gratt. 624	476, 484
Lancaster <i>v.</i> Hamilton, 77 Mo. 551	159, 160
Lancaster <i>v.</i> Towashend, 8 Am. St. Rep. 712 ; 112 N. Y. 93	181
Lang <i>v.</i> Reid, 12 Moore, P. C. 86	372
Langbein <i>v.</i> Doud, 83 Am. Dec., 641 ; 6 Allen, 423	318
Langbein <i>v.</i> Burhans, 11 Johns., 461	130
Langwith <i>v.</i> Dawson, 30 U. C. C. P. 375	481
Lantz <i>v.</i> Mattett, 102 Ind. 23	420
Lapham <i>v.</i> Briggs, 27 Vt. 26	376
Larrañee <i>v.</i> Knight, 69 Mo. 320	203
La Riviere <i>v.</i> La Riviere, 97 Mo. 80	404
Larum <i>v.</i> Wilmer, 35 Iowa, 244	158, 178
Latimer <i>v.</i> R. R. Co., 97 Am. Dec. 378 ; 43 Mo. 105	524

	PAGE
Lauer v. Randow, 4 N. W. R. 774; 48 Wis..638	743, 744
Laughlin v. January, 59 Mo.. 383	202
Law v. Bartlett, 8 Allen. 259	199
Law v. Bigby, 4 Bro. Ch. 60	679
Lawler v. White, 27 Tex.. 250	430
Lawless v. The Calcutta L. & S. Co., 1. L. R., VII Cal., 627	748
Lawrence v. Englesby, 24 Vt.. 42	516
Lawrence v. Hunt, 25 Am. Dec. 539; 10 Wend., 80	178(Ad.)
Lawrence v. Milwaukee, 45 Wis.. 306	30
Lawson v. Conaway, 16 S. E. R.. 501	84
Lazier v. Westcott, 82 Am. Dec.. 404; 26 N. Y.. 146	540, 590(Ad.)
Lea v. Lea, 96 Am. Dec. 772; 99 Mass. 493	129
Leach v. Kohn, 36 Iowa, 144	412
Leach v. Whittake, 5 B. & Ad. 409	481
Leaman v. Sample, 91 Ind. 236	172
Lease v. Sherwood, 21 Cal.. 151	138(Ad.)
Leatherwood v. Sullivan, 1 S. R. 718; 81 Ala.. 458	451
Leauenworth v. Chicago R. R. Co., 134 U. S.. 688	482
Leavitt v. Mowe, 54 Md.. 613	677 (Ad.)
Leavitt v. Wolcott, 95 N. Y.. 212	177
Lebanon v. Mead, 64 N. H.. 8	233
Le Chevelier v. Lynch, 1 Dougl.. 170	603
Leechmere v. Fletcher, 1 Cr. & M.. 634	738
Ledgard v. Bull, 1. R. XIII I. A. 134; 1. L. R., IX All., 191	409, 458, 469
Lee v. Kingsbury, 62 Am. Dec.. 546; 13 Tex., 68	55
Lee v. Tannenbaum, 62 Ala.. 501	652
Leggott v. Great Northern Ry. Co., 1 Q. B. D., 599	180(Ad.)
LeGrange v. Ward, 11 Ohio. 257	481
Leitch v. Wells, 48 N. Y.. 613	694, 718, 719
Lekhray Roy v. Kanhya Singh. L. R., I I. A. 317	310
Leland v. Marsh, 16 Mass.. 389	637
Lenders v. Anderson, 12 Q. B. D., 50	404
Lenoir's Adm'r v. Wilson, 36 Ala.. 600	669
Lenox v. Clark, 52 Mo.. 115	402, 403
Lee Roy v. Rogers, 89 Am. Dec.. 88; 30 Cal.. 229	684
Leslie v. Land Mortgage Bank of India, IX B. L. R., 171; XVIII W. R., 269	322
Le Sueur v. Le Sueur, L. R., 1 P. D., 139	536
Levan v. Millholland, 114 Pa. St.. 49	476
Levett v. Mathews, 24 Pa. St. 330	515(Ad.)
Levy v. McCrone, Morris, (I. a.). 91	224
Levy v. Moylan, 10 C. B. 189	426(Ad.)
Lewis v. Alfred, 57 Ala. 628	2387
Lewis and Nelson's Appeal, 67 Pa. St.. 153	54
Lewis v. Dunlop, 57 Miss.. 130	203
Lewis v. Graham, 20 Q. B. D., 780	359
Lewis v. Mew, 15 strob. Eq 180	729
Lewis v. Morrow, 1 S. W. R. 93; 89 Mo.. 174	457
Lhoneux v. Honkong S. B. Corporation, 23 Q. B. D. 519	369, 370
Liddell v. Chidester, 5 Am. St. Rep. 387; 84 Ala.. 508	129
Life Association v. Fassett, 102 Ill.. 315	407
Lilley v. Adams, 108 Mass.. 50	52
Lindley v. O'Reilly, 7 Am. St. Rep. 802; 50 N. J. L.. 636	339, 400
Lindsey v. Delano, 78 Iowa, 350	476
Linduff v. Stenbenville Co., 14 Ohio, 336	290
Linehan v. Hathaway, 54 Cal.. 251	482
Linin v. Arambould, 55 Tex.. 611	138(Ad.)
Linn v. Carson, 32 Gratt. 170	397
Lipscomb v. Postell, 77 Am. Dec.. 651; 38 Miss. 476	226e
Lis v. Wilcoxon, 2 Col.. 85	432
Little v. Fitts, 33 Ala.. 343	461 (Ad.)
Little v. Sinnott, 7 Iowa, 324	442 (Ad.)
Little v. State, 75 Tex.. 616	224, 293, 430
Littleton v. Richardson, 66 Am. Dec.. 759; 34 N. H.. 179	231
Littleton v. Smith, 119 Ind.. 380	428
Liverpool Borough Bank, v. Walker, 4 De. G. & J.. 24	745
Liverpool Marine Credit Co v. Hunter, 3 Ch. Ap.. 479	586

	PAGE
Livingston v. Bishop, 3 Am. Dec. 330; 1 Johns., 290	735, 751, 753, 757
Livingstone v. Jefferson, 1 Brock, 230	327, 328
Llewellyn v. Ram Sunder Sahoy, 11 L. R., 50	60
Lloyd v. Barr, 11 Pa. St., 41	135, 227
Lloyd v. Malone, 74 Am. Dec., 179; 23 Ill. 43	164 (<i>Ad.</i>)
Lockyer v. Ferryman, L. R. 2 Ap. Ca. 530, 528 per Lord Selborne...	3, 24
Logan v. Caffrey, 30 Pa. St., 196	613, 656
Long v. Bishop of Cape Town, 1 Mo. P. C. (N. S.) Cas., 461	263(<i>Ad.</i>)
Long v. Neville, 29 Cal., 132	686
Lorance v. Platt, 67 Miss., 183	60
Lord v. Cannon, 75 Ga., 300	228
Lord v. Goldberg, 15 Am. St. Rep. 84; 81 Cal. 596	314
Lord v. Wilcox, 99 Ind. 491	181 (<i>Ad.</i>)
Lorillard v. Wyde, 19 Am. St. Rep. 470; 123 N. Y., 41	29, 30, 49, 64(<i>Ad.</i>), 601
Loring v. Mansfield, 17 Mass., 394	72
Loring v. Marsh, 2 Cliff. U. S. C. C., 311	682
Lothian v. Henderson, 3 Bos. & Pul., 499	512
Louis v. Brown, 109 U. S., 162	170, 176
Louisiana v. Jumel, 107 U. S., 711	222
Louisiana Levee Co. v. Louisiana, 31 La. Ann., 250	52
Lovejoy v. Albee, 54 Am. Dec., 630; 33 Me., 414	378
Lovejoy v. Murray, 3 Wall., 1	160, 751, 755
Loving v. Lamson, 50 Me., 334	388
Low v. Pratt, 53 Ill., 438	728
Lowe v. Mussey, 41 Vt., 392	34(<i>Ad.</i>)
Lowell v. Boston R. Co., 34 Am. Dec., 33; 23 Pick., 24	235
Lucas v. Le Compte, 42 Ill., 303	613, 651, 655
Lucas v. San Francisco, 28 Cal., 591	613, 764
Lucas v. Todd, 28 Cal., 182	516(<i>Ad.</i>)
Luce v. Dexter, 135 Mass., 23	734, 758
Luchmeenath v. Madho Dass, 11 All. H. C. R., 70	321
Luchmun Sahoy v. Ramsarn, XX W. R., 144	617, 666
Lukenback v. Anderson, 47 Pa. St., 123	491
Ludlow's Heirs v. Kidd's Ex'rs, 3 Ohio, 541	138 (<i>Ad.</i>), 702, 703
Luhrs v. Kelley, 67 Cal., 289	483
Lukmidas v. Pershotam, 1. L. R., VI Mad., 700	748
Lyman v. Brown, 2 Curtis, 559	682
Lyman v. Faris, 53 Iowa, 498	205 (<i>Ad.</i>), 208, 219
Lynch v. Swanton, 53 Me., 100	49
Lyon v. Perin Manufacturing Co., 125 U. S., 698	124

M

Mackreth v. Glasgow and South Western Ry. Co., L. R. 8 Ex., 149	371
Madan Mohan Lal v. Sheosanker Sahai, 1. L. R., XII Cal., 482	613, 660
Madhavan v. Keshavan, 1. L. R., XI Mad., 191	217
Madhavi v. Kelu, 1. L. R., XV Mad., 264	45, 173
Madho Dass v. Sita Ram, 111 All. H. C. R., 121	349
Madoo v. Bulloo, Mor., 149	355
Madu v. Umardin, 1893 P. R., No. 36	186
Mufizooddeen v. Amooddeen, XXIII W. R., 58	123
Maghee v. Collins, 27 Ind., 83	737
v. Hardy, 4 Bing. N. C., 782	202
v. Randolph, 77 N. C. 79	651, 655
v. Mahadeo Singh, 1. L. R., XVIII Cal., 647	
Mahabeer Singh v. Rambhajan Sah, 1. L. R., XVI Cal., 545	
Mahabir Pershad v. Macnaghten, L. R. XVI 1. A. 107; 1. L. R., XVI Cal., 682	
Mahabir Singh v. Behari Lal, 1. L. R., XIII All., 320	289
Mahammad Azmat Ali Khan v. Lalli Begum, L. R. IX 1. A. 8; 1. L. R., VIII Cal., 422	
Mahaney v. Penman, 4 Duer. 603	
Maharaja of Kashmir v. Fattah Din, 1888 P. R., No. 164	
Mahesh Bai v. Chandar Bai, 1. L. R., XIII All., 17	

	PAGE
Mahima Chandra v. Raj Kumar , 1 B. L. R., A. C., 1	57
Mahomed Hossein Khan v. Shib Dyal , V All. H. C. R., 108	314
Mahomed Momin v. Lutafut Hossein , XIII W. R., 289	130
Mahomed Riasat Ali v. Hasin Banu , I. L. R., XXI Cal., 157	645 (<i>Ad.</i>)
Mahomed Salim v. Nabian Bibi , I. L. R., VIII All., 282	22
Mahomed Shuffi v. Laldin , I. L. R., III Bom., 227	348, 352
Mahoney v. Van Winkle , 33 Cal., 458	107 (<i>Ad.</i>)
Mahonney v. Middleton , 41 Cal., 41	88 (<i>Ad.</i>)
Mahsum Ali v. Niyabatkhani , 1888 P. R., 145	394
Mail v. Maxwell , 107 Ill., 554	676 (<i>Ad.</i>)
Maine Moilar v. Islam , I. L. R., XV Mad., 355	248
Maksud Ali v. Nargis Dye , I. L. R., XX Cal., 322	616, 666
Maktum v. Imam , X B. H. C. R., 298	
Malford v. Stalzenback , 46 Ill., 308	
Malloney v. Horan , 10 Am. Rep. 335; 49 N. Y., 115	
Maloney v. Dewey , 11 Am. St. Rep. 131; 127 Ill., 395	476, 484
Maloney v. Dewey , 19 N. E. R., 848	167
Mallory v. Riggs , 39 N. W. R., 886; 76 Iowa, 748	465
Mamat Ram v. Bapu Ram , I. L. R., XV Cal., 159	253
Manappa Mudali v. McCarthy , I. L. R., III Mad., 192	57, 296
Manohha Ram v. Umba Pragjee , Bom. S. C. 181	255
Mandeville v. Reynolds , 68 N. Y., 528	
Manigault v. Holmes , 1 Bail. Eq., 283	
Manju Nath v. Venkatesh Govind , I. L. R., VI Bom., 54	27
Mankin v. Ohandler & Co. , 2 Brook., 125	498, 760, 762
Mann v. Hari Ram , 1 Borr., 84	264
Mann v. Roberts , 11 Len., 57	692, 693, 706
Manohar Bhivray , II B. H. C. R., A. C., 374	412, 416
Man Singh v. Narayan Das , I. L. R., I All., 480	149
Marchbanks v. Banks , 44 Ark., 48	715 (<i>Ad.</i>)
Marix v. Franke , 9 Kan., 132	455
Markel v. Evans , 47 Ind., 326	136 (<i>Ad.</i>)
Markhan v. Burlington Ins. Co. , 29 N. W. R., 435; 69 Iowa, 515	169
Markham v. Thompson , 23 La. Ann., 685	153
Marriot v. Hampton , 2 Sm. L. Ca. 373	81
Marriott v. Hampton , 7 T. R. 269	2, 76
Marsh v. Conquest , 17 C. B. (N. S.) 418	350
Marsh v. Keith , 1 Dr. & Sm. 342	618
Marsh v. Pier , 26 Am. Dec. 131; 4 Rawle. 273	5
Marshall v. Shafter , 32 Cal. 176	56 (<i>Ad.</i>)
Martin v. Cobb , 77 Tex. 544	373
Martin v. Darling , 78 Me. 78	516 (<i>Ad.</i>)
Martin v. Ellerbe , 70 Ala. 326	198, 216 <i>a</i>
Martin v. Goode , 32 Am. St. Rep. 799	289 (<i>Ad.</i>)
Martin v. Kennedy , 2 Bos. & P. 69	12
Martin v. Lawrence , I. L. R., IV Cal., 655	321
Martin v. Tally , 72 Ala. 23	224, 451
Mason v. Alston , 59 Am. Dec. 515; 9 N. Y. 28	38
Mason v. Eldred , 6 Wall. 231	743
Messenger , 17 Iowa, 261	
Massachusetts Mutual Life Insurance Co. v. Chicago & R. Co. , 13 Fed. Rep. 85	
Masser v. Strickland , 17 Am. Dec. 668; 17 Serg. & R. 354	
Massey v. Burton , 27 L. J. Ex. 101	355
Massie v. Watts , 6 Cranch. 148	337
Masson v. Saloy , 12 La. Ann. 776	
Masta v. Radhakisen , 1889 P. R., No. 5	
Masten v. Olcott , 101 N. Y. 153	56 (<i>Ad.</i>)
Mathappa Chetti v. Chellappa Chetti , I. L. R., I Mad., 196	345,
Mathene v. McIntosh , 40 Wis. 120	420 (<i>Ad.</i>)
Mathews v. Lawrence , 43 Am. Dec. 665; 1 Denio, 212	734,
Mathive v. McIntosh , 40 Wis. 120	420 (<i>Ad.</i>), 461 (<i>Ad.</i>)
Matter of Dodge Mfg. Co. , 77 N. Y. 101	385 (<i>Ad.</i>)
Maule v. Murray , 7 T. R. 278	682
Maxon v. Sawyer , 12 Ohio, 195	

E OF

r. Clarke, 139 Mass.	112
May, ex parte, 12 Q. B. D.	497
May, In re, 25 Ch. D.	286
Mayamal v. Bela Singh,	1890 P. R., No. 121
Mayashankar v. Harishankar,	I. L. R., X Bom., 661
Mayer v. Hover,	81 Ga. 308
Mayers v. Cormwell,	51 Cal. 482
Mayhew v. Tulloch,	IV All. H. C. R., 25
Mayor of London v. Cox,	2 H. L. 239
Mayor of York v. Pilkington,	1 Atk. 282
McAllister v. Brooks,	38 Am. Dec. 282; 22 Me. 80
McCaffrey v. Carter,	125 Mass. 330
McCall v. Jones,	72 Ala. 368
McCauley v. Fulton,	4 Pac. R. 170; 44 Cal. 355
McCalley v. Wilburn,	77 Ala. 549
McCardy v. Bangham,	43 Ohio, 78
McClanahan v. West,	100 Mo. 309
McCleary v. Menke,	109 Ill. 294
McClelland v. Moore,	48 Tex. 355
McCormick v. McClure,	39 Am. Dec. 441; 6 Blatchf. 466
McCormick v. Pa. Cen. R.,	49 N. Y. 308
McCoy v. Ayres,	2 Wash. 203
McCoy v. McCoy,	29 W. Va. 794
McCracken v. Flanagan,	24 N. Y. 439; 52 Hun. 614
McCrillis v. Harrison Co.,	63 Iowa, 592
McCrimm v. Cooper,	37 Tex. 423
McCroory v. Parks,	18 Ohio, 1
McCullough v. Hellman,	8 Oreg. 191
McCurdy v. Baughman,	43 Ohio, 78
McCutchen v. Miller,	31 Miss. 65
McDade v. Burch,	50 Am. Dec. 407; 7 Ga. 559
McDaniel v. Hughes,	3 East. 367
McDermott v. Strong,	4 Johns. Ch. 687
McDonald v. Mobile L. Ins. Co.,	65 Ala. 358
McDonald v. Prescott,	90 Am. Dec. 517; 2 Nev. 109
McDonagh's Succession,	24 La. Ann. 33
McDougall v. Knight,	25 Q. B. D. 1
McDougall v. Paterson,	11 C. B. 755
McEvoy v. Rock,	34 N. W. R. 740; 37 Minn. 402
McEvoy v. Trustees,	38 N. J. Eq. 420
McEwan v. Zimmer,	31 Am. Rep. 333; 38 Mich. 765
McFaddin v. Preston,	54 Tex. 403
McFarlane v. Cushman,	21 Wis. 401
McFarlane v. Derbyshire,	8 Q. B. 12
McGavock v. Pollack,	14 N. W. R. 659; 13 Neb. 535
McGill, Ex parte,	6 Tex. App. 498
McGilton v. Lone,	54 Am. Dec. 449; 13 Ill. 486
McGilvray v. Avery,	30 Vt. 538
McGlawhorn v. Worthington,	3 S. E. R. 633; 98 N. C. 199
McHenry v. Lewis,	21 Ch. D. 202
McIntosh v. Lowndes,	49 Barb. 550
McKay v. Gordon,	34 N. J. L. 286
McKay v. Kilburn,	42 Mich. 614
McKim v. Doane,	137 Mass. 195
McKinley v. Tuttle,	42 Cal. 571
McKintosh v. Gill,	XII B. L. R., 37; XX W. R., 358
McKintosh v. Smith,	4 Macq. 913
McKnight v. Bell,	135 Pa. St. 858
McKnight v. Devlin,	11 Am. Rep. 715; 52 N. Y. 399
McKnight v. Dunlop,	4 Barb. 36
McLaughlin v. Bank of Potomac, &c.,	7 How. 230
McLaughlin v. Hill,	6 Vt. 20
McLean v. Meek,	18 How. 16
McLemore v. Chicago R. Co.,	58 Miss. 514

	PAGE
Milliken v. Whitehouse , 49 Mo. 527	205
Mills Public v. Larrabee , 78 Iowa, 97	372 <i>h</i>
Milne v. Van Buskirk , 9 Iowa, 558	166, 542
Milner v. Shiply , 91 Mo. 106	444
M. Iroy v. Mining Co. , 43 Mich. 231 ... ..	...
Milwaukee, &c., R. R. Co. v. Milwaukee & R. R. Co. , 88 Am. Dec. 735; 20 Wis. 174 ... ..	...
<i>v. West</i> , 95 Am. Dec. 359; 38 Ga. 18	718
<i>in v. Subramanya</i> , L. R. XIV I. A. 160; I. L. R., XI Mad., 26	410, 470
<i>Point R. R. v. Keep</i> , 74 Am. Dec. 134; 22 Ill. 9 ... ..	...
Mining Co. v. Deferrari , 61 Cal. 160 ... ..	...
Mink v. Shaffer , 124 Pa. St. 2-0 ... ..	...
Minor v. Lon. & N. W. Ry. Co. , 1 C. B. N. S. 325 ... ..	...
Minor v. Walter , 17 Mass. 237 ... ..	...
Missouri Pacific Ry. Co. v. Reid , 8 Pac. R. 846; 34 Kan. 410	455
Mitchell v. Aten , 1 Am. St. Rep. 231; 37 Kan. 33	476
Mitchell v. Brunce , 2 Paige Ch. 606 ... ..	...
Mitchell v. Bunch , 22 Am. Dec. 669; 2 Paige, (N. Y.) 606	337,
Mitchell v. Hender , 23 L. J. Q. B. 273 ... ..	...
Mitchell v. Hudson , 23 L. J. Q. B. 273 ... ..	...
Mitchell v. Insley , 7 Pac. R. 201; 33 Kan. 654	150
Mitchell v. Libbey , 33 Me. 74	735
Mitchell v. Mitchell , 96 N. C. 14	289(Ad.)
Mitchell v. Pease , 7 Cush. 350	198
Mitchell v. Schoonover , 8 Am. St. Rep. 282; 16 Oreg. 211	407
Mitcheltree v. Sparks , 1 Scamp. 198	316(Ad.)
Mitna v. Fuzl Bab , XIII M. I. A. 573; XIV W. R., (P. C.) 15; IV B. L. R. 148	56
Mitter v. Messageries Maritimes , 54 L. J. Q. B. 527 ... ..	...
Moale v. Hollins , 33 Am. Dec. 684; II Gill & J. ... ..	...
Mobaruck Hussein v. Sheo Gobind , XVIII W. R., 61 ... ..	...
Modhu Soodun v. Cochrane , VI C. L. R. 417 ... ..	...
Modhusudun Koer v. Rakhal Chunder , I. L. R., XV Cal., 104 ... ..	...
Modhusudun Shaha v. Brae , I. L. R., XVII Cal., 300	83
Moffitt v. Moffitt , 69 Ill. 641 ... ..	...
Mohammed Hossein v. Akhaya Narayan , XI B. L. R. Ap. 42 ... ..	...
Mohan Lal v. Bilaso , I. L. R., XIV All. 512 ... ..	...
Mohan Lal v. Ram Dial , I. L. R., II All., 843	62, 122
Mohesh Mahto v. Shaik Piru , I. L. R., II Cal., 470 ... ..	...
Mohideen v. Pitchey , [1893] A. C. 193 ... ..	...
Mohidin v. Muhammad Ibrahim , I M. H. C. R., 245 ... ..	...
Mohima Chundra v. Asradha Dassia , XV B. L. R., 251; XXI W. R., 207 ... ..	...
Mohubut Mundul v. Shoorendro Nath Roy , IV W. R. S. C. C. R. 20 ... ..	...
Mohun Lal v. Bebee Doss , VII M. I. A. 428 ... ..	...
Moidin Rowther v. Ellaya Chinidathil , VI I. J. 464 ... ..	...
Moller v. Tuska , 87 N. Y. 166 ... ..	...
Molyneux v. Seymour , 76 Am. Dec. 662; 30 Ga. 447 ... ..	...
Momtazoddeen Mahomed v. Rajkoomar Das , XIV B. L. R., 408 ... ..	...
Mondel v. Steel , 8 M. & W. 858	69, 75, 76, 62
Mooni Roy v. Raj Bansi Koer , XXV W. R., 393 ... ..	...
Mon Mohun Sirkar v. Secretary of State for India , I. L. R., XVII Cal., 968	154
Monohur Lal v. Gouri Sunkur , I. L. R., IX Cal., 283; XII C. L. R., 454 ... ..	...
Monroe v. Douglas , 4 Sandf. Ch. 182 ... ..	...
Montgomery v. Carlton , 56 Tex. 311	106
Montgomery v. Wasem , 115 Ind. 343 ... ..	...
Moon v. Crowder , 72 Ala. 79 ... ..	...
Moore v. Jeffers , 53 Iowa, 202 ... ..	...
Moore v. Martin , 38 Cal. 428	451, 461(Ad.)
Moore v. Neil , 89 Am. Dec. 303; 39 Ill. 256	465
Moore v. Nowell , 94 N. C. 266	289
Moore v. Philbrick , 52 Am. Dec. 642; 32 Maine, 102	525
Moore v. Tanner's, Am'r , 27 Am. Dec. 35; 5 P. B. Mon. 42	516
Moore v. Tate , 10 Am. St. Rep., 712; 87 Tenn. 725	372 <i>r</i>
Moore v. Town Council of Edgfield , 32 Fed. Rep. 498	287
Mootoo v. Verapah Chetty , XVII W. R., 243	815
Mootoo Vijaya v. Katama Natchiar , XI M. I. A. 50	65

TABLE OF CASES.

	PAGE
Moran v. Mansur, 68 N. H. 277 ... ..	...
Morgan v. Skidmore, 3 Abb. New Cas. 92 ... ..	...
Morgan v. Thorne, 7 M. & W. 400 ... ..	...
Moring v. Ables, 52 Am. Rep. 186; 62 Miss. 271	56 (Ad.)
Moro Abaji v. Narayan, I. L. R., XI Bom., 355	46
Moro Raghubath v. Balaji Trimbak, I. L. R., XIII Bom., 45	648
Morrill v. Merrill, 28 Am. St. Rep. 95; 20 Or. 96	482, 475, 487
Morris v. Baumgarten, Bourke, 128 Cory. 152	351
Morris v. Davies, 5 Cl. & F. 163	469
Morris v. Gentry, 89 N. C. 248	484
Morris v. Hand, 70 Tex. 481	622 (Ad.)
Morris v. Hinchman, 31 Kan. 720	305 (Ad.)
Morris v. Morange, 38 N. Y. 172	138 (Ad.)
Morris v. Rexford, 18 N. Y. 552	592
Morris v. Renington, 1 Parson's Eq. Cas. 387 ... ..	...
Morris v. Robinson, 3 B. & C. 196 ... ..	...
Morse v. Elms, 131 Mass. 151	37
Morse v. Presby, 25 N. H. 382, 299	425, 430
Morton v. Crane, 39 Mich. 526	436
Morton v. Sweetser, 12 All. 134	411
Morton v. Webb, 7 Vt. 124	677 (Ad.)
y v. Cooke, 7 Leigh. 225	372
v. Julian, 84 Am. Dec. 114; 45 N. H. 852	384 (Ad.), 387 (Ad.), 414
ingam v. Mazari, I. L. R., XII Cal., 271	400
r. McCullough, 5 Hill (N. Y.) 131; 7 Barb. 279	205, 223, 226 c
Mosten v. Oleott, 101 N. Y. 153	56 (Ad.)
v. Fabrigas, 1 Cowp. 161	327, 335
Motionand v. Dadabhai, XI B. H. O. R., 186	309
Motiram v. Bai Mancha, 1876 Bom. P. J., 129	268
Mould v. Williams, 5 Ad. & El. 469	489
Munda Nawaz v. Sajidunnissa, I. L. R., XVIII Cal., ... ..	...
Muyer v. Lobengeir, 4 Watts. 390 ... ..	...
M. Rae v. Mattoon, 13 Pick. 53 ... ..	...
v. Ram Dyal, VIII B. L. R., 50	259
... .. 1886 P. R., No. 6	104, 180
..., 386	61
..., 1882 P. R. ... ..	...
Mula Mal v. Gurdial, 1887	428
Mulehand v. Suganohand, I. L. R., I Bom., 28	461 (Ad.)
Muldrow v. Norris, 2 Cal. 74	255
Muljee v. Nagar, Bom. S. C. 131	151
Muluk Faqeer Buksh v. Manohur Dass, II All. H. C. B., 29	672
Muncie v. Brown, 112 Ind. 474	240, 451, 455
... .. 412	I. A. 123; I. L. R.,
VIII Cal. 51; XI C. L. R. 118 ... ..	...
Lall v. Pigne, X W. R., 379	577, 582, 584
Munroe v. Filkington, 2 R. & S. 11; 31 L. J. Q. B. 81 ... ..	...
Murari v. Suba, I. L. R., VI Bom., 725	429, 430 (Ad.)
Murchison v. White, 54 Tex. 82	468
Murphy v. Lyons, 19 Neb. 689	690, 694 (Ad.), 704
Murray v. Ballou, 1 Johns. Ch. 566	758

TABLE OF CASES.

	PAGE.
Muttukumarappa v. Arumuga, I. L. R., VII Mad., 145	149
Myers v. Davis, 47 Iowa, 325	460
Myrick v. Selden, 36 Barb. 15	704

N

Nabob of Arcot v. The East India Co., Ves. 59	372
Nagathal v. Ponnusami, I. L. R., XVIII Mad., 44	668
Naimudda v. Scott, III B. L. R. 283	420
Nallatambi Madaliar v. Ponnusami Pillai, IV I. J. 229 ; I. L. R., II Mad., 400	380, 566, 567, 568, 571
Namasivaya v. Kadir Aminal, IV M. L. J. 31	394(Ad.)
Nandakumar v. Ishan Chandra, I B. L. R. A. C. 91 ; X W. R., 130	288
Nandkumar v. Radha Kuari, I. L. R., I All., 282	190
Nandlal Dass v. Tapidas, I. Bom. 14	266
Nanhoon Singh v. Tofanee Singh, XII B. L. R., 113 ; XX W. R., 33	310
Nanu v. Raman, I. L. R. XVI Mad. 335...	650
Napton v. Leaton, 71 Mo. 358	558, 560
Narain Das v. Faiz Shah, 1889 P. R., No. 157, F. B.	133, 148, 150
Narain Das v. Kotumal, 1883 P. R., 132	409
Narain Das v. Newton, VI All. H. C. R., 43	366
Narain Dat v. Bhairo Bukhsk, I. L. R., III All., 189	68
Narasamma v. Kanay, I. L. R., IV Mad., 134	134, 147
Narasayya v. Venkata Krishnayya, I. L. R., VII Mad., 397	316
Narasidavur v. Narana Kaundan, II M. H. C. R., 440	290
Narasimma Chariar v. Sri Kristna Tata Chariar, VI M. H. C. R., 449	250
Narasinga Rau v. Venkatanarayana, I. L. R., XVI Mad., 481	621
Narayan v. Pandurang, XII B. H. C. R., 148	647
Narayanan v. Narayanan, I. L. R., XV Mad., 69	305
Narayan v. Pandurang, I. L. R., V Bom., 685	189, 212
Narayan Ramchandara v. Parashram Moreshvar, 1878 Bom. P. J. 44	297
Narayan Sadanand v. Balkrishna, IX B. H. C. R., 413	244, 256
Narayan Vithe Parab v. Krishnaji Sadashiv, I. L. R., X Bom., 233	245
Narberham v. Navindram, V B. H. C. R. A. C., 46	317
Narinjan Das v. Ram Kishen, XIV P. R., Cr. 85 ; 1879 P. R., No. 32	348, 352, 353
Naro Balvant v. Ramchandra, I. L. R., XIII Bom., 326	618, 646
Naro Hari v. Anpurnabai, I. L. R., XI Bom. 160 n ; 1874 Bom. P. J. 218	11, 12, 416
Nash v. Hunt, 116 Mass. 237	138
Nashville R. Co. v. United States, 113 U. S. 261	127
Nasratullah v. Mujibullah, I. L. R., XIII All., 309	106
Nathans v. Hope, 77 N. Y. 420	12
Nathu Singh v. Rura, XVI P. R., 23	61
Nave v. Adams, 28 Am. St. Rep. 421 ; 107 Miss. 414	177
Neale v. Ellis, 1 D. & L. 163...	654
Necome v. Light, 44 Am. Rep. 604 ; 58 Tex. 141	388(Ad.)
Neerbhoy Singh v. Rampershad Singh, XVIII W. R., 262	313
Nehal Singh v. Chunda Singh, 1890 P. R., No. 140	174
Nehora Roy v. Radha Pershad Singh, IV C. L. R. 353 ; I. L. R. V Cal. 64	419
Neilley v. Neilley, 89 N. Y. 35 ;	180(Ad.)
Nemchand v. Savaichand, I. L. R., V Bom. 84 (n)	265
Neve v. Weston, 3 Atk. 557	679
Newburg v. Munshower, 23 Am. Rep. 769 ; 29 Ohio, 617	402
Newby v. Colt's Firearm Co., 7 Q. B. 293...	368
Newby v. Van Oppen, 7 Q. B. 293	369, 370
Newcomb v. Newcomb, 26 Am. Rep. 222 ; 13 Bush. 544	425, 435
Newcomb v. Peck, 44 Am. Dec. 340 ; 17 Vt. 302	466
Newcome v. Light, 44 Am. Rep. 604 ; 58 Tex. 141	387, 388(Ad.), 414 (Ad.)
Newington v. Levy, L. R. 6 C. P. 180 ; L. R. 5 C. P. 607	105, 106
Newman v. Chapman, 14 Am. Dec. 766 ; 2 Rand. 93	694(Ad.), 696(Ad.)
Newman v. Hammond, 46 Ind. 119	478(Ad.)
Newman v. Waterman, 53 Am. Rep. 310 ; 63 Wis. 612	515
New Port Bridge Co. v. Douglass, 12 Bush. 673	372d, 372g
Newton v. Egmont, 5 Sim. 130	211
Ney v. Swinney, 36 Ind. 454	485

	PAGE.
Niamut Khan v. Phadu Buldia, I. L. R., VI Cal., 319	148
Niazulla Khan v. Nazir Begam, 1892 All. W. N. 240	186
Niboyet v. Niboyet, 4 P. D. 1	529, 604
Nicholl v. Mason, 21 Wend. 339	677(Ad.)
Nichols v. Dibrell, 61 Tex. 539	69
Nicklin v. Williams, 10 Ex. 259	638
Nidhi Lal v. Mazhar Husain, I. L. R., VII All., 230	285
Nield v. Burton, 49 Mich. 53	52b
Nielson, <i>ex parte</i> , 131, U. S. 176	238b
Nihal Singh v. Kaman, 1888 P. R., No. 9	273
Nilakant Banerji v. Suresh Chandra, I. L. R., XII Cal., 414 ; L. R. XII I. A. 171	714
Nill v. Comparet, 79 Am. Dec. 411 ; 16 Ind. 107	144
Nil Madhub v. Brojonath, I. L. R., XXI Cal., 236	116(Ad.)
Nilmonee Singh v. Issur Chunder, IX W. R., 121	636
Nil Money Singh v. Heera Lall Dass, I. L. R., VII Cal., 23 ; VIII C. L. R., 257	143
Nilo Ramchandra v. Govind Ballal, I. L. R., X Bom., 24	103
Nilvaru v. Nilvaru, I. L. R., VI Bom., 110	23, 146
Nirman Singh v. Phulman Singh, I. L. R., IV All., 65	105
Nishadiney Dossee v. Cally Kristo Ghose, Cor. 24	351
Nityanand v. Surma v. Kashinath Naiyalankar, V W. R. 26	238
Nobin Chandra v. Magantara Dassya, I. L. R., IX Cal., 924	749
Nobin Chunder v. Mookta Soonduree, VII B. L. R., Ap. 38 ; XV W. R., 309	168
Nobin Chunder v. Nim Chand, XVII W. R., 191	171
Nobin Chunder Dey v. The Secretary of State for India, I. L. R., I Cal., 11	372q
Noble v. Merrill, 48 Me. 140	202
Nobo Doorga Dasi v. Foyz Bux, I. L. R., I Cal., 200 ; XXIV W. R., 40	10
Nodine v. Greenfield, 34 Am. Dec. 363 ; 7 Paige, 544	192(Ad.)
Noel v. Robinson, 1 Ver. 90	321
Nonoo Singh v. Anand Singh, I. L. R., XII Cal., 291	628, 670
Norris v. Chambres, 29 Beav. 246 ; 30 L. J. Ch. 285	334, 336
North v. Mudge, 81 Am. Dec. 441 ; 13 Iowa, 496	127, 402, 744
Northampton v. Smith, 11 Mete. 390	384(Ad.)
North Carolina v. Temple, 134 U. S. 22	222
Northcutt v. Lemery, 8 Or. 317	425
North Missouri R. R. Co. v. Akers, 4 Kan. 453	412
Norton v. Birge, 35 Conn. 250	684b, 716
Norton v. Doherty, 63 Am. Dec. 758 ; 3 Gray, 372	52b
Norton v. Florence Land Co., 7 Ch. D. 332	682
Norton v. Huxley, 13 Gray, 290	72(Ad.)
Nouvion v. Freeman, 15 Ap. Ca. 1	577
Novelli v. Rossi, 22 B. & Ad. 757	552, 567
Nowla Ooma v. Bala Dharmaji, I. L. R., II Bom., 91	2 8
Noyes v. Butler, 6 Barb. 613	443, 558
Nuffur Merdha v. Ram Lall, XV W. R., 308	713
Nugender Chunder Ghose v. Kaminee Dossee, XI M. I. A. 241	191
Nund Lall v. Abou Mahomed, I. L. R., V Cal., 597, V C. L. R. 45	666
Nundo Lall v. Bidhoo Mookhy, I. L. R., XIII Cal., 17	143
Nundram v. Kashee Pande, IV Beng. S. D. A. Sel. Rep. 89 ; III Beng. S. D. A. Sel. Rep. 310	257
Nur Muhammad v. Jamun, 1890 P. R., No. 153	26

Oakey v. Hicken, 12 La. Ann. 11	309(Ad.)
Oakley v. Aspinwall, 3 N. Y. 547	386, 414(Ad.)
Oakley v. Pegler, 46 N. W. R. 920 ; 30 Neb. 628	466
O'Beirne v. Lloyd, 43 N. Y. 248	660
Ober v. Gallagher, 93 U. S. 199	676(Ad.)
Obhoy Churn v. Bhoobun, XII W. R., 524	171
Oceanic S. T. N. Co. v. Compania, T. E. 30 Am. St. Rep. 685 ; 134 N. Y. 461	235
Ochsenbein v. Papelier, 8 Ch. App. 700	556, 584, 594
O'Connor v. Varney, 10 Gray, 231	623, 623
O'dea v. O'dea, 101 N. Y. 23	375, 535
Ogden v. Folliot, 3 T. R. 733 ; 10 Wheaton, 123	599

TABLE OF CASES.

41

	PAGE
Ogle v. Baker, 21 Am. St. Rep. 886 ; 137 Pen. St. 378 ...	486
O'Hara v. McConnell, 93 U. S. 159 ...	166
Okhoy Coomar v. Mahatap Chunder, I. L. R., V Cal., 24 ...	617
Olcott v. Little, 9 N. H. 259... ..	746
Oldham v. Ledbetter, 1 How. (Miss) 43 ...	204
Oleson v. Merrihew, 45 Wis. 397 ...	114
Oliver v. Holt, 46 Am. Dec. 223 ; 11 Ala. 574 ...	655
Oliver v. Markanda, III M. L. J. 263 ...	277
O'Neal v. Brown, 21 Ala. 82 ...	631
Oneida County Bank v. Bonney, 101 N. Y. 173 ...	
Ooma Soonduree v. Bepin Beharee, XIII W. R., 292 ...	419
Orde v. Skinner, L. B. VII I. A., 197 ; I. L. R., III All., 91 ; VII C. L. R. 295 ; ...	
	IV I. J. 479, 348
O'Reilly v. Nicholson, 45 Mo. 160 ...	457
Ormelade v. Coke, Cro. Jac. 354 ...	125
Orr-Ewing v. Orr-Ewing, 9 Ap. Ca. 34 ; 22 Ch. D. 456 ...	335, 336
Orthwein v. Thomas, 11 Am. St. Rep. 159 ; 127 Ill. 554 ...	185, 200
Osborne v. Williams, 40 N. W. Rep. 165 ; 39 Minn. 353... ..	625
Osborn v. Cloud, 23 Iowa, 104 ...	
Osborn v. Sutton, 9 N. E. R. 410 ; 108 Ind. 443... ..	435
Osgood v. Maguire, 61 N. Y. 524 ...	516 (Ad.)
Ostrander v. Hart, 130 N. Y. 406 ...	172
Oulton v. Radcliffe, 1 Ap. Ca. 281 ; 9 C. P. 189 ...	411
Otterson v. Middleton, 102 Pa. St. 78 ...	
Outram v. Morewood, 3 T. R. 346 ...	...4, 43, 52d, 158
Overstreet v. Davis, 24 Miss. 393 ...	
Overton v. Cranford, 78 Am. Dec. 244 ; 7 J. L. 415 ...	460
Owen v. State, 7 Neb. 108 ...	37
Owens v. Gotzian, 4 Dill. 438 ...	466
Pachom Awasthi v. Ilahi Bakhsh, I. L. R., IV All., 478... ..	458
Padayachi v. Vithilinga, I. L. R., XV Mad., 111 ...	23
Page v. McKee, 96 Am. Dec. 201 ; 3 Bush. 135 ...	33, 337
Paget v. Ede, L. R. 18 Eq. 118 ...	321, 335 (Ad.), 336
Pahlwan Singh v. Risal Singh, I. L. R., IV All., 55 ...	45
Paigi v. Sheonarain, I. L. R., VIII All., 78 ...	268
Paine v. Root, 121 Ill. 77 ...	728
Palamal v. Maya, 1890 P. R., No. 146 ...	104, 150
Palaski Co. v. Stuart, 28 Gratt, 879 ...	425
Palmer v. Hussey, 87 N. Y. 303 ...	55(Ad.)
Palmer v. Peterson, 1 N. W. R. 73 ; 46 Wis. 401 ...	459
Pando orang v. Balumbhat, Bom. S. C. 196 ...	255
Param Singh v. Lalji Mal, I. L. R., I All., 403 ...	79
Parbhu Lal v. Mylne, I. L. R., XIV Cal., 401 ...	205
Parekh Ranchor v. Bai Vakhat, I. L. R., XI Bom., 119 ...	192
Pari Mal v. Vasanda Ram, XII P. R., 71 ; 1877 P. R. No. 33 ...	94
Park Gate Iron Company v. Coates, L. R. 5 P. C. 634 ...	471
Parker v. Betcher, 1 3S. E. R. 314 ; 87 Ga. 110 ...	400
Parker v. Coleord, 12 N. H. 30 ...	677(Ad.)
Parker v. Starr, 33 N. W. Rep. 424 ; 21 Neb. 680... ..	169
Parker v. Ket, 1 Ld. Baym. 658 ...	478
Parker v. The Simla Bank Corporation, P. R. No. 34 of 1878, Civil ...	355
Parkhurst v. Berdell, 6 Am. St. Rep. 384 ; 110 N. Y. 386 ...	176
Parkhurst v. Summer, 56 Am. Dec. 94 ; 23 Vt. 538 ...	226c
Parks v. Jackson, 25 Am. Dec. 656 ; 11 Wend. 442 ...	709, 751
Parmalee v. Wheeler, 32 Wis. 429 ...	682
Parr v. State 17 Atl. Rep. 1020 ...	160
Parry v. Woodson, 84 Am. Dec. 51 ; 33 Mo. 317 ...	158, 467
Parthasaradi v. Chinna Krishna, I. L. R., V Mad., 304 ...	31, 32
Parvati v. Kisansingh, I. L. R., VI Bom., 567 ...	715
Pasewalk v. Bollman, 26 Am. St. Rep. 399 ; 29 Neb. 519 ...	226h
Pascal, <i>ex parte</i> , 1 Ch. D. 507 ...	362
Pate v. Shafer, 19 Ind. 173 ...	293
Pathuma v. Aiyssa, M. H. C. Su. Ap. No. 619 of 1883 ...	618

	PAGE
Patnam v. New Albany , 4 Biss. 365	
Patrick v. Shaffer , 94 N. Y. 423	69(Ad.),
Patrick v. Shedden , 2 El. & Bl. 14	571
Partridge v. Gopp , Amb., 596	719
Pattaravy v. Audimula , V M. H. C. R., 419 ...	
Patton v. Caldwell , 1 Dall. 419	
Paul v. Arnold , 29 Ind. 197... ..	309
Paul v. Burton , 32 Vt. 155	289
Paul v. Roy , 21 L. J. Ch. 361	577
Paul v. Smith , 82 Ky. 451	
Paul v. Willis , 69 Tex. 261	
Paul v. Witman , 3 Watts, & S. 409	
Paxton v. Daniell , 23 Pac. R. 441	
Peabody v. Hamilton , 106 Mass. 217	
Peacock v. Bell I Saund , 73... ..	
Peak v. Ligon , 10 Yerg. 468	34(.
Peale v. Phipps , 14 How. 372	
Pearce v. Atwood , 13 Mass. 324	479
Pearce v. Alney , 28 Conn. 544	108
Peary Lall v. Komal Kishore , I. L. R., VI Cal., 30	152
Peary Mohun v. Ali Sheikh , I. L. R., XX Cal., 249	
Pease v. Whitten , 31 Maine. 117	
Peck v. Culberson , 104 N. C. 425	
Peck v. Essex Freedholders , 21 N. J. L. 656 ; 1 Zab. 658	384
Peck v. Hibbard , 62 Am. Dec. 605; 26 Vt. 702 ...	605
Peck v. Jenness , 7 How. 624	517
Peck v. State , 33 Am. St. Rep. 738, 137 N. Y. 372	220(Ad.)
Peck v. Strauss , 33 Cal. 685	466
Peel v. January , 37 Am. Rep. 27 ; 35 Ark. 331 ...	491
Pendleton v. Weed , 17 N. Y. 72	447
Peninsular and Oriental Steam Navigation Company v. Secretary of State for India , I Bourke 166; V B. H. C. R. Ap. 1 372p.	372c, 372d
Peninsular Ry. Co. v. Howard , 20 Mich. 25	357, 386
Peniston v. Somers , 15 La. Ann. 679	125
Penn v. Lord Baltimore , 1 Ves. Sr. 444	339
Penn v. Lord Baltimore , Notes to 2 Lead. Cas. Eq. 1806	
Pennoyer v. McConnaughy , 140 U. S. 1	220a
Pennoyer v. Neff , 95 U. S. 714	377, 463, 532, 558, 608
Pennsylvania R. Co. v. Duquesne Boroyugh , 46 Pa. St. 223	372i
Pennybecker v. McDougal , 48 Cal. 160	293
Penobscot R. R. Co. v. Weeks , 52 Maine, 456	428
People v. Baker , 32 Am. Rep. 274 ; 76 N. Y. 78... ..	374, 375, 535
People v. Cassels , 5 Hill. 164	440
People v. Corner , 59 Hun. 299	372d
People v. Dennison , 84 N. Y. 272	222, 372d
People v. Downing , 4 Sand. 189	486
People v. Holladay , 27 Am. St. Rep. 186 ; 93 Cal. 241	108, 208
People v. Hagar , 52 Cal. 182	442
People v. Harrison , 82 Ill. 84... ..	743
People v. Jose Raman , 27 Cal. 73	385
People v. Johnson , 97 Am. Dec. 770 ; 38 N. Y. 63 ...	63, 130
People v. Mercein , 38 Am. Dec. 644 ; 3 Hill (N. Y.) 393...	108(Ad.)
People v. Miles , 56 Cal. 401	372d
People v. Platt , 117 N. Y. 159	348
People v. Rowe , 4 Park. Cr. 253	466
People v. Sturtevant , 59 Am. Dec. 536 ; 9 N. Y. 263	242
People v. Smith , 93 Cal. 490	208
People v. Williams , 24 Cal. 31	384(Ad.)
People's Sav. Bank v. Hodgdon , 46 Cal. 98	108
People's Saving Bank v. Wilcox , 2 Am. St. Rep. 894 ; 15 R. I. 258	427, 441
People v. Talmage , 6 Cal. 256	732j
Pepper v. Donnelly , 87 Ky. 259	113 (Ad.), 114 (Ad.)
Percy v. Foote , 36 Conn. 102	12(Ad.)
Periasami v. Tevar , II C. L. R. 81	172
Perkin v. Proctor and Green , Wils. 382	

	PAGE
Perkins v. Parker, 10 Allen, 22	108(Ad.)
Perkins v. Rich, 12 Vt. 595	229
Perkins v. Walker, 19 Vt. 144	37, 128
Perrine v. Farr, 22 N. J. L. 365	238b
Perry v. Dickerson, 39 Am. Rep. 663; 85 N. Y. 345	656
Perry v. Harrington, 37 Am. Dec. 98; 2 Met. 368	661
Perry v. Mills, 76 Iowa, 622	661
Pertabnarain Singh v. Trilokinath Singh, I. L. R. XI Cal. 186; L. R. XI A. 191	190
Peruvian Guano Co. v. Dreyfus, 1892 A. C. 166... ..	193(Ad.)
Peter v. Schlosser, 81 Pa. St. 439	292, 293
Peterson v. Lathorp, 34 Pa. St. 223	163, 221(Ad.)
Petree v. Bill, 2 Bush. 62	706
Pfirman v. Wattles, 49 N. W. R. 40; 86 Mich. 264	460
Phagoona Moyce, 1854 Cal. S. D. D. 465	262
Phelps v. Winona, 35 N. W. R. 273	677(Ad.)
Philipson v. Earl of Egremont, 6 Q. B. 587; 6 Ad. & C. N. S. 587	189, 485
Phillips v. Berick, 8 Am. Dec. 299; 16 Johns. 136	651(Ad.)
Phillips v. Eyre, L. R. 6 Q. B. 1	327, 387
Phillips v. Hunter, 2 H. Bla., 402	546
Phillips v. Quick, 68 Ill., 324	678(Ad.)
Philpott v. Aslett, 2 Sm. L. Ca. 373 (Note)	81
Phosphate Sewage Company v. Molleson, 4 App. Cas., 801	64
Phundo v. Jangi Nath, I. L. R., XV All., 327	31, 175
Pickett v. Ferguson, 55 Am. Rep., 545; 45 Ark., 177	684b
Pico v. Cohn, 25 Am. St. Rep. 159; 91 Cal. 129	489
Pico v. Webster, 12 Cal., 140	236
Picquet v. Swan, 5 Mason, 43	374, 378
Pierce v. Carleton, 54 Am. Dec., 405; 12 Ill., 358... ..	204
Pierce v. Bosten, 3 Met, 520	372g
Pierce v. Delamater, 1 N. Y. 17	384 (Ad.)
Pierce v. Stinde, 11 Mo. Ap., 364	702
Pierro v. St. Paul Ry. Co., 37 Minn., 314; S. C. On Appeal, 12 Am. St. Rep. 673; 39 Minn. 451	632, 667
Pike v. Hoare, 2 Eden, 182	321, 328
Pilley v. Robinson, 20 Q. B. D., 155	742
Pine v. Countess of Leicester, Hob. 37	327
Pinney v. Barnes, 17 Conn., 420	622, 651
Pinson v. Ivey, 9 Tenn. 296... ..	497
Pisani v. Attorney-General for Gibraltar, L. R. 5, P. C., 515	468
Pittapur Raja v. Buchi Sitayya, L. R. XII I. A. 16, I. L. R., VIII Mad., 219	43
Pittapur Raja v. Suriya Rau, L. R. XII I. A. 116, I. L. R., VIII Mad., 620	616 (Ad.), 631, 645
Pittman v. Chrisman, 59 Miss. 126	655
Pittsburgh v. Reno, 123 Ill., 273	147
Place v. Batternutts Mfg. Co., 28 Barb., 503	384
Planoche v. Fletcher, 1 Doug. 251	599
Plicque v. Perret, 19 La., 318	131
Plimpton v. Bigelow, 93 N. Y. 593	516 (Ad.)
Plowman v. Henderson, 59 Ala., 559	387
Plumer v. Howard Inst., 46 N. J. L., 211	420
Plummer v. Douglas, 81 Am. Dec., 456; 14 Iowa, 72... ..	127(Ad.)
Poindexter v. Burwell, 82 Va., 507	339
Pollard, <i>Ex parte</i> , 1 Mont. & Ch. 239	336
Pollard v. Wagener, 13 Wis., 569	444
Pomeroy v. Betts, 31 Mo., 419	403
Pond v. Doneghy, 18 B. Mon. (Ky.) 558	166(Ad.)
Pond v. Makepeace, 2 Met., 114	199
Poorman v. Mitchell, 48 Mo., 45	34
Poorun Mal v. Khedoo Sahoo, VII Beng. S. D. A. Sel. Rep. 336	261
Pope v. Harrison, 16 Lea. 82	427(Ad.)
Progash Paray v. Hachim, VII W. R., 417	351
Porter v. Gile, 47 Vt., 620	484
Porter v. Pico, 55 Cal. 165	473
Porter v. Purdy, 29 N. Y., 106	442
Porter v. Stout, 73 Ind., 3	465

	PAGE
Porterfield v. Butler, 12 Am. Rep. 329; 47 Miss., 165	453
Portis v. Hill, 98 Am. Dec. 481; 30 Texas, 529 .. ..	...
Port Jervis v. First National Bank, 96 N. Y., 550 ... ..	...
Posey v. Eaton, 9 Lea., 500... ..	...
Posthlewate v. Ghiselin, 97 Mo., 420 ... ..	...
Poston v. Eubank, 3 J. J. Marsh, 43 ... ..	...
Potter v. Brown, 5 East. 124; 7 R.R., 663	604
Powell v. Campbell, 19 Am. St. Rep., 350; 20 Nev., 232	724 (<i>Ad.</i>)
Powell v. Williams, 48 Am. Dec. 105; 14 Ala. 476	730
Powers v. Benedict, 88 N. Y. 605 .. ..	...51(<i>Ad.</i>)
Powers v. Heath's Adm'r, 20 Mo. 319	185
Poyser v. Minors, 7 Q. B. D. 329	24
Pragji Kalam v. Govind Gopal, I. L. R., XI Bom., 535	265
Pramada Dasi v. Lakhi Narain. I. L. R., XII Cal., 60	614, 673
Pranjivan v. Bajju, I. L. R., IV Bom., 34	694
Pratap Chandra v. Swarnamayi, IV B. L. R. F. B. 113	154, 643
Pratt, <i>Ex parte</i> , 12 Q. B. D., 334	471
Pratt v. Daw, 56 Me., 81	428
Pratt v. Cunliff, 9 Allen., 90	203
Pray v. Hegeman, 98 N. Y., 351... ..	...64, 128
Preacher's Aid Society v. England, 106 Ill., 125	147
Premanund v. Ram Churn, XX W. R., 482	93
Prem Chand v. Mokhode Debi, I. L. R., XVII Cal., 699	340
Preslar v. Stallworth, 37 Ala., 402 ... ..	... 228, 231(<i>Ad.</i>)
Preston v. Clark, 9 Ga., 246	476
Preston v. Rickets, 91 Mo., 320	56(<i>Ad.</i>), 231(<i>Ad.</i>)
Preston v. Tubbin, 1 Vern., 286	698, 704
Price v. Peters, 15 Abb. Pra., 197	481, 586
Price v. Springfield Real Estate Ass'n, 20 Am. St. Rep., 595; 101 Mo., 107	427
Price v. White, I Bayley's Eq., 208	698
Priest v. Deaver, 22 Mo. App., 276	665
Prigg v. Adams, 2 Salk., 674	287
Prince v. Antle, 135 W. R., 436	451
Prince v. Griffin, 16 Iowa, 552	432
Pritchard v. Farrar, 116 Mass., 213	231
Pritchard v. Hitchcock, 6 Man. & G. 151	219, 235
Pritchard v. Madren, 31 Kan., 38	483
Prosunno Kumari Debya v. Golabchand, L. R. II I. A. 145; XIV B. L. R., 450; XXIII W. R. 253	193
Puna Bibee v. Khoda Buksh, XXII W. R., 396	472
Punchanun v. Shib Chunder, I. L. R., XIV Cal., 835	326
Punchram v. Krishna Ravi, 2nd Appeal No. 1271, D 1887. Decided 22nd March 1888	83
Punnoo Singh v. Nirghin Singh, I. L. R., VII Cal., 298; VIII C. L. R., 310... ..	115
Pursley v. Hayes, 92 Am. Dec. 350; 22 Iowa, 11	476
Pursun Gopal v. Poornanund, XXI W. R., 279	110, 111
Purumsookh v. Soobhan, II Agra, 323	669
Putali v. Tulja, I L. R., III Bom., 223	112
Pyke v. Crouch, 1 Ld. Raym., 730	192

Q

Quarl v. Abbett, 52 Am. Rep. 662; 102 Ind. 233; 1 N. E. R., 476	238, 342, 464
Queen v. Inhabitants of Hartington, 4 El. & B. 780	54
Q. v. Milledge, 4 Q. B. D., 332	381
Q. v. Meyer, 1 Q. B. D., 173	381
Q. v. Farrant, 20 Q. B. D., 58	382
Q. v. Justices of Great Yarmouth, 8 Q. B. D., 525	381
Q. v. Manchester S. and L. R. Co., L. R. 2 Q. B., 336	382
Q. v. Rand, L. R. 1 Q. B., 230	381
Queen v. Saddlers' Company, 30 L. J. Q. B. 186; On Appeal 10 H. L. C. 431	485, 486
Quinnebang Bank v. Tarbox, 20 Conn., 510 ... ..	...

R

R. v. Buttery, R. and R., 342	511
R. v. Grundon, II Sm. L. C., 829 ... ..	...

	PAGE
<i>R. v. Lolley</i> , 2 Russ. & R. C. C., 237 ...	523
<i>R. v. Martin</i> , R. & R., 106 ...	350
<i>R. v. Murray</i> , 2 East P. C., 496 ...	349
<i>R. v. The Duke of Richmond</i> , 6 T. R., 561 ...	350
<i>R. v. Wye</i> , 7 A. & E., 761 ...	513
<i>R. R. Co. v. R. R. Co.</i> , 20 Wall., 137 ...	30
<i>Radhabai v. Anantrav</i> , I. L. R., IX Bom., 198 ...	193
<i>Radha Kishen v. Sham Serma</i> , 11 Ben. S. D. A. Sel. Rep., 332 ...	257
<i>Radhanath v. Land Mortgage Bank of India</i> , I. L. R., VI Cal., 559 ...	99
<i>Radha Prasad Singh v. Lal Sahab Rai</i> , I. L. R., XVII, I. A. 150; I. L. R., XIII All., 53 ...	109
<i>Radha Prasad Singh v. Pathan Ojah</i> , I. L. R., XV All., 364 ...	315
<i>Radhasyam v. Sibbi</i> , I. L. R., XV Cal., 647 ...	694
<i>Radhia v. Beni</i> , I. L. R., I All., 560 ...	94
<i>Rae v. Hulbert</i> , 17 Ill., 572 ...	487
<i>Rajendro Lall v. Shama Churn</i> , IV C. L. R., 417 ...	300
<i>Raghoberdial v. Sheo Baksh Singh</i> , I. L. R., IX Cal., 439; L. R. IX I. A. 197; 20, 393, 394, 396 ...	264
<i>Raghunath v. Janardhan</i> , I. L. R., XV Bom., 599 ...	326
<i>Raghu Nath Das v. Kakkan Mal</i> , I. L. R., III All., 568 ...	169
<i>Rahimbhoy v. Turner</i> , I. L. R., XVII Bom., 341 ...	170, 752
<i>Rahmubhoy v. Turner</i> , I. L. R., XIV Bom., 408 ...	368
<i>Railroad Co. v. Harris</i> , 12 Wall., 65 ...	37, 512
<i>Railroad v. Schulte</i> , 103 U. S., 118 ...	368
<i>Railway Co. v. Whitton</i> , 13 Wall., 270 ...	165
<i>Raj Doollah v. Ooma Churn</i> , XXI W. R., 109 ...	692, 714
<i>Raj Kishen Mookerjee v. Radha Madhub Holdar</i> , XXI W. R., 349 ...	262
<i>Raj Kisto v. Nobae Seal</i> , I W. R., 351 ...	318
<i>Raj Mohun v. E. I. R. Co.</i> , X B. L. R., 241 ...	322
<i>Raja Kundan v. Mattammal</i> , III M. H. C. R., 92 ...	663
<i>Rajah Sutto Churn v. Obhoy Nund</i> , 2 W. R., (Act X Rul.) 31 ...	300
<i>Rajendro Lall v. Shama Churn</i> , I. L. R., V Cal., 188 ...	295, 303
<i>Rajo v. Dasu</i> , 1888 P. R., No. 44 ...	10
<i>Rakhal Dass v. Hira Motee Dasi</i> , XXII W. R., 282 ...	374
<i>Ralston's Appeal</i> , 93 Pa. St., 133 ...	164 (Ad.)
<i>Ralston v. Lahee</i> , 74 Am. Dec. 291; 8 Iowa, 17 ...	227
<i>Ralston v. Wood</i> , 58 Am. Dec. 604; 15 Ill., 159 ...	245
<i>Rama v. Shivram</i> , I. L. R., VI Bom., 116 ...	155
<i>Ramabhadra v. Jagannatha</i> , I. L. R., XIV Mad., 328 ...	106
<i>Ramachandra v. Darvada</i> , III M. A. C. R., 207 ...	174
<i>Ramachandra v. Narayan</i> , I. L. R., XI Bom., 216 ...	140 (Ad.)
<i>Ramasami v. Sami</i> , I. L. R., XVII Mad., 96 ...	37, 162
<i>Ramasami v. Virasami</i> , III M. H. C. R., 272 ...	257
<i>Ramaswamy Aiyar v. Venkata Achary</i> , IX M. I. A., 344 ...	200
<i>Rambromo v. Bunsu Kurmoker</i> , XI C. L. R., 122 ...	109
<i>Ramchandra Jivaji v. Khatal Mahomed</i> , I. L. R., X Bom., 28 ...	352
<i>Ramchandra v. Keshav</i> , I. L. R., VI Bom., 100 ...	119
<i>Ramcharan v. Reazuddin</i> , I. L. R., X Cal., 856 ...	174
<i>Ramchundra Bhimaji v. Abaji Parashram</i> , 1886 Bom. P. J., 15 ...	479
<i>Ram Das v. The Official Liquidator</i> , I. L. R., IX All., 366 ...	262
<i>Ram Dechul v. Chukhoo</i> , I All., 291 ...	321
<i>Ram Dhone v. Nobumony</i> , Bourke O. C., 213 ...	301
<i>Ram Ditta v. Mohamed Khan</i> , X P. R., 159 ...	116
<i>Ram Gobind v. Mungar</i> , XIII C. L. R., 83 ...	114, 134
<i>Ramireddi v. Subbareddi</i> , I. L. R., XII Mad., 500 ...	258
<i>Ramkant v. Gobin Chunder</i> , VIII Cal. S. D. A., 398 ...	31, 760
<i>Ram Kirpal v. Rup Kuari</i> , I. L. R., VI All., 269; I. R., XI I. A. 37 ...	260
<i>Ram Kishen v. Doonee Chand</i> , II P. R., 122 ...	40, 127
<i>Ram Krishna v. Vithal</i> , I. L. R., XV Bom., 89 ...	23, 34, 764
<i>Ram Lal v. Chhab Nath</i> , I. L. R., XII All., 578 ...	28, 238
<i>Ram Lal v. Tula Ram</i> , I. L. R., IV All., 97 ...	321
<i>Ram Lall v. Chittro Coomaree</i> , XV W. R., 277; IX B. L. R., 171 ...	194, 212
<i>Ram Narain v. Bisheshar Prasad</i> , I. L. R., X All., 411 ...	262
<i>Ram Nath v. Ram Lochan</i> , 1859 S. D. A. D., Beng. 535 ...	111
<i>Ramnath Roy v. Bhagbut</i> , III W. R., (Act X Rul.) 140 ...	146, 750
<i>Ramnath Roy v. Chunder Sekhur</i> , IV W. R., 50 ...	353
<i>Ram Paul</i> , VIII C. L. R., 14 ...	

Ram Raj v. Girnandan, I. L. R., XV All., 63..	
Ram Ruttun v. Gori, VII P. R., 83	200
Ramsaran v. Rakhal Das, VI B. L. R., 244 (n) ..	267
Ram Sewak v. Nakhed, I. L. R., IV All., 261 ...	618, 670
Ram Soonder v. Delaney, XX W. R., 103	645
Ram Soondur v. Krishno Chunder, XVII W. R., 380	663
Ramtanu v. Komal Lochan, III B. L. R., Ap. 37 ...	168
Rand v. Hanson, 26 Am. St. Rep. 210; 154 Mass. 87	430
Randall v. Lowe, 98 Ind. 261	691
Rangamma v. Vohalayya, I. L. R., XI Mad., 127...	673
Rangely v. Webster, 11 N. H. 299... ..	401, 553
Rani Sadut Kooer v. Jawalla Pershad, 1861 N. W. P. R., S. D. A., 720	255
Ranje Khan v. Birbal, 1889 P. R., No. 91	295
Rankin v. Goddard, 89 Am. Dec. 718; 54 Maine, 28	540, 547
Rao Kurun Singh v. Mahomed Fyz Ali Khan, XIV M. I. A., 187; X B. L. R., 1 ...	648
Rape v. Heaton, 76 Am. Dec. 269; 9 Wis. 328	608
Rapelye v. Prince, 40 Am. Dec. 257; 4 Hill. 119	234
Rasmussen v. McCabe, 43 Wis. 471	456
Rathbone v. Hooney, 58 N. Y. 463	181
Ratigan v. Holloway, 69 Tex. 468	289
Ravji Narayan v. Krishnaji Lukhshman, XI B. H. C. R. 139...	697
Ray v. Roe, 18 Am. Dec. 159; 2 Blatchf. 258	719
Raymond v. Butterworth, 139 Mass. 471	406(Ad.)
Raymond v. Hinkson, 15 Mich. 113	257
Raymond v. Morrison, 59 Iowa, 371	483
Raymond v. Richmond, 78 N. Y. 351	236
Raymond v. State, 28 Am. Dec. 382; 54 Minn. 562	372d, 372e, 372i
Read v. Allen, 58 Tex. 380	200(Ad.)
Read v. Brown, 22 Q. B. D. 131	627
Rector v. Drury, 3 Pinney, 298; 4 Chandler, 24 ...	455
Redmond v. Coffin, 2 Dev. Eq. 437	
Reed, <i>ex parte</i> , 100 U. S. 23	
Reed v. Douglas, 7 Am. St. Rep. 476; 74 Iowa, 244	88(Ad.),
Reed v. Pratt, 2 Hill, 64	
Reed v. Thomas, 66 Ga. 595	481
Reformed P. D. Church v. Brown, 54 Barb. 191 ..	660, 661
Reg v. Bolton, 1 Ad. & El., N. S. 66	243, 489
Reg v. Hartington, 4 El. & B. 780	499
Reid v. Holmes, 127 Mass. 326	408, 409
Reimers v. Druce, 23 Beav. 145; 26 L. J. Ch. 196	647, 555, 582, 584, 594
Rein v. Stein (1892) 1 Q. B. 753	345
Renaud v. Abbott, 116 U. S. 277	402
Rendell v. School District, 75 Me. 358	51
Renick v. Ludington, 20 W. Va. 511	764
Renier v. Hurlbut, 29 Am. St. Rep. 850; 81 Wis. 24	608
Ressequie v. Byers, 38 Am. Rep. 775; 52 Wis. 650	77
Revell v. Blake, L. R. 7 C. P. 300; L. R., 8 C. P. 533	439
Rewa Mahton v. Ram Kishen Singh, I. L. R., XIV Cal., 18; L. R., XIII I. A. 1	
Rexford v. State, 105 N. Y. 229	
Reynolds v. Coleman, 36 Ch. D. 453	346
Reynolds v. Fleming, 46 Am. Rep. 86; 30 Kan. 106	
Reynolds v. Harris, 9 Cal. 338	
Reynolds v. Stockton, 3 Am. St. Rep. 305; 10 Atl. R. 385; 43 N. J. Eq. 211; S. C.	
On Appeal, 140 U. S. 254... ..	41
Rhoades v. Selin, 4 Wash. 716	50...
Riayatullah Khan v. Nasirkhan, I. L. R., VI All., 616 ...	645
Ricardo v. Garcias, 12 Cl. & Fin. 368	546
Rice Stix and Co. v. Peteel, 66 Tex. 568	325
Rice v. Cutler, 84 Am. Dec. 747; 17 Wis. 351	179(Ad.)
Rice v. Curtis, 32 Vt. 460	342
Rice v. Shute, 5 Burr. 2611	739, 741
Rice v. Whitney, 12 Ohio. 358	69(Ad.)
Richards v. Barlow, 140 Mass. 218	622(Ad.)
Richards v. Skiff, 8 Ohio, 586	436
Richardson v. Hunter, 23 La. Ann. 255	405
Richardson v. White, 19 Ark. 241	473(Ad.)

	PAGE
Ricketts v. Spraker, 77 Ind. 371	459
Rider v. Kelso, 53 Iowa, 367... ..	712
Rider v. Union India Rubber Co., 28 N. Y. 371	53
Ridgley v. Stillwell, 27 Mo. 128	128
Riley v. Lowell, 117 Mass. 76	420(Ad.)
Rippetoe v. Dwyer, 22 Am. Rep. 370; 65 Tex. 703	704
Risley v. Phenix Bank, 38 Am. Rep. 421; 83 N. Y. 318	516 (Ad.)
Rivard v. Gardner, 39 Ill. 125	491
Robbins v. City of Chicago, 4 Wall. 658	158, 233
Roberts v. Henri, 27 Ala. 678	49
Roberts v. Jackson, 1 Wend. 486	695, 733
Roberts v. Knights, 7 Allen, 449	370
Roberts v. Norris, 67 Ind. 386	114
Robertson v. Haffman, 92 Ind. 247... ..	451
Robertson v. Smith, 9 Am. Dec. 227; 18 Johns. 459	744
Robertson v. Wright, 17 Gratt. 534	198
Robinson v. Baskins, 22 Am. St. Rep. 202; 53 Ark. 330... ..	226h
Robinson v. Bland, 1 W. Bl. 234	564
Robinson v. Crowninshield, 1 N. H. 77	650
Robinson v. Duleep Singh, 11 Ch. D. 798	132, 451
Robinson v. Snyder, 74 Ind. 110	743
Robson v. Eaton, 1 T. R. 62... ..	163
Rockwell v. Brown, 36 N. Y. 207	630
Rockwell v. Perine, 5 Barb. 573	290
Rockwell v. Langley, 19 Pa. St. 502	137
Roderigas v. East River Sav. Inst., 32 Am. Rep. 309; 76 N. Y. 316	427, 527
Rodermund v. Clark, 46 N. Y. 356... ..	52c
Roemer v. Newman, 19 Fed. Rep. 98	678
Rogers v. Felcher, 77 Ga. 46	
Rogers v. Haines, 3 Mo. 322	
Rogers v. Hatch, 8 Nev. 39	
Rogers v. Higgins, 57 Ill. 244	
Rogers v. Hoskins, 15 Ga. 27	
Rogers v. Odell, 39 N. H. 457	376
Rogers v. Ratcliff, 3 Jones. 225	137
Rogers v. Rogers, 15 B. Mon. 364	568
Roghoonath v. Juggat Bundhoo, I. L. R., VII Cal., 214	116(Ad.)
Rolfe v. Learmonth, 14 Q. B. 196	369
Rollins v. Henry, 84 N. Car. 569	516(Ad.)
Roodurman v. Damodar, 1 Hay. Rep. 365... ..	257
Rookminee Koor v. Ram Tohul Roy, XXI W. R., 223... ..	642
Rooper v. Givin, 21 Iowa, 59	594
Root v. Dill, 38 Ind. 169	743
Root v. Fellows, 6 Cush. 29	465
Roper v. Rowlett, 7 Lea. 320	228
Rose v. D. V. R. Co., 47 Iowa, 420	466
Rose v. Governor, 24 Tex. 491	372i
Rose v. Himely, 4 Cranch, 241	524, 608
Rosenheim v. Harstock, 90 Mo. 357	476, 484, 722
Rosenmueller v. Lampe, 31 Am. Rep. 74; 89 Ill. 212	660
Rosenthal v. Renick, 44 Ill. 202	199
Ross v. Weber, 26 Ill. 221	76
Ross Johnson v. Secretary of State, 2 Hyde, 153... ..	357
Roth v. Roth, 44 Am. Rep. 81; 104 Ill. 35	532, 533
Rousillon v. Rousillon, 14 Ch. D. 351	555, 599
Routledge v. Hislop, 2 E. & E. 549	617
Rowe v. Smith, 16 Mass. 306	83
Rowden v. Brown, 91 Mo. 429	427
Rucker v. Steelman, 97 Ind. 222	49
Rude v. Mitchell, 97 Mo. 365	404
Rughunath v. Issur Chunder, I. L. R., XI Cal., 153	391
Run Bahadur Singh v. Luchoo Koer, I. L. R., XI Cal., 301; L. R., XII I. A. 23,	20, 28, 147
Rundle v. The Secretary of State, 1 Hyde 37	356
Rungrav v. Sidhi Mahomed Ebrahim, I. L. R., VI Bom., 482... ..	14, 110, 112
Rupe v. Hadley, 113 Ind. 416	

TABLE OF CASES.

	PAGE
Rupkuari v. Ramkirpal , 1. L. R., III All., 141 ...	62
Rush v. Rush , 26 Am. Rep. 179, 46 Iowa, 648 ...	532
<i>v. Smyth</i> , 9 M. & W. 810 ...	544
<i>v. State</i> , 11 Kan. 322 ...	491
<i>v. Place</i> , 94 W. S. 606 ...	137(<i>Ad.</i>)
<i>Chunder v. Ram Lall</i> , XXII W. R., 301 ...	285
Ryers, In re , 28 Am. Rep. 88; 72 N. Y. 1 ...	386
Ryersou v. Chapman , 66 Me. 557 ...	228
Ryerss v. Ripley , 25 Wend. 432 ...	299(<i>Ad.</i>)

S

Sabeer Khan v. Kalli Das , 1 W. R., 199 ...	617
Sachit v. Budhua Kumar , 1. L. R., VIII All., 429 ...	190
Sacramento Savings Bank v. Spencer , 53 Cal. 737 ...	166(<i>Ad.</i>)
Sadasiva v. Ramalinga , XV B. L. R., 383; L. R., II I. A. 219; XXIV W. R., 193 ...	469
Sadaya Pillai v. Chinni , 1. L. R., II Mad., 352 ...	92
Saem v. Kamaluddy , XXII W. R., 424 ...	638
Sage v. Harpending , 49 Barb. 166 ...	144
Sager v. Blain , 44 N. Y. 115 ...	114
Sakharam v. Ganesh Sathe , 1. L. R., III Bom., 193 ...	571
Salahmunissa v. Mohesh Chander , XVI W. R., 85 ...	39
Salig Ram v. Tribhawan , 1885 All. W. N. 171 ...	122
Salle v. Light , 39 Am. Dec. 317; 4 Ala. 700 ...	231
Salmond v. Price , 42 Am. Dec. 204; 13 Ohio, 368 ...	524
Salter v. Salter , 6 Bush. 625 ...	712
Sena Rayar v. Annamabai Chetti , 1. L. R., VII Mad., 161 ...	571, 573
Sanborn v. Fellows , 2 Post. 473 ...	385
Same's Appeal , 26 Pa. St. 184 ...	157
Saminatha v. Rangathammal , 1. L. R., XII Mad., 285 ...	673
Saminatha v. Varisai Mahomed , II M. H. C. R., 301 ...	319
Sampson v. Ohleyer , 22 Cal. 200 ...	233, 686, 732
Samuel v. Dinkins , 75 Am. Dec. 729; 12 Rich. 172 ...	200
Sanders v. Rains , 10 Mo. 770 ...	466
Sandon v. Morris , 5 Sim. 248 ...	6-6
Sangapa v. Gangapa , 1. L. R., II Bom., 176 ...	211
Sangster v. Kay , 5 Exch. 386 ...	359
Sankumani v. Ikoran , 1. L. R., XIII Mad., 213 ...	470
Sant Kumar v. Sukh Nidhan , 1. L. R., VIII All., 365 ...	190
Santom v. Ballard , 133 Mass. 465 ...	405
Sant Ram v. Nihala , 1889 P. R., No. 52 ...	280
Sapp v. Wightman , 103 Ill. 150 ...	723
Sarnam v. Sakina , 1. L. R., III All., 37 ...	290
Sarup Sing v. Jowahir Singh , XVI P. R., 66 [1881] ...	171
Sathappayyar v. Periasami , 1. L. R., XIV Mad., 1 ...	101
Satterlee v. Bliss , 36 Cal. 489 ...	185
Sauls v. Freeman , 12 Am. St. Rep. 190; 21 Flo. 209 ...	385
Savage v. Stevens , 128 Mass. 254 ...	735, 753, 758
Saveland v. Green , 36 Wis. 612 ...	231
Sawyer v. Woodbury , 66 Am. Dec. 518; 7 Gray, 499 ...	137
Sayre v. Harpold , 33 W. Va. 553 ...	482
Scamahorn v. Scott , 42 Iowa, 529 ...	202
Scarlett v. Gorham , 28 Ill. 319 ...	715(<i>Ad.</i>)
Schee v. La Grange , 42 N. W. R., 616; 78 Iowa, 101 ...	465
Scheible v. Slagle , 89 Ind. 323 ...	144
Schenck v. Schenck , 10 N. J. Law. 276 ...	679(<i>Ad.</i>)
Schibsy v. Westenholtz , L. R. 6 Q. B. 155, ... 376, 379, 406, 544, 566, 567	
Schissel v. Dickson , 28 N. E. R. 540; 19 E. W. R., 587; 129 Ind. 139 ...	465
School District v. Stocker , 42 N. J. L. 115 ...	129
Schoon Maker v. Clear Water , 41 Barb. 200 ...	385
Schrader v. Manufacturers Nat. Bank , 133 U. S. 67 ...	207
Schriver v. Eckenrode , 87 Pa. St. 213 ...	524
Schroder v. Lahrman , 1 N. W. R. 801; 26 Minn. 87 ...	161
Schuler v. Israel , 120 U. S. 506 ...	34, 87
Schultz v. Schultz , 60 Am. Dec. 335; 10 Gratt. 368 ...	427
Schuyler v. McCrea , 16 N. J. L. 248 ...	402

Scotland County v. Hill, 112 U. S. 183	...	...	...	...	...	...	...	...
Scott, <i>ex parte</i> , 4 Barn. & Cross. 253	...	...	...	...	...	...	...	...
Scott v. Moore, 98 Am. Dec. 581; 41 Vt. 205	...	...	...	...	...	...	...	257, 293
Scott v. Rogers, 77 Iowa, 483	...	...	...	...	...	...	...	724
Scott v. Shearman, 2 W. Bl. 977	...	...	...	...	...	...	...	500, 502
Scranton v. Ballard, 64 Ala. 402	...	...	...	...	...	...	...	476
Scudder v. Sargent, 15 Neb. 103	...	...	...	...	...	...	...	699
Scudder v. Van Amburg, 4 Edw. Ch. 31	...	...	...	...	...	...	...	710
Scuddy v. Schaffar, 14 La. Ann. 576	...	...	...	...	...	...	...	68 (<i>Ad.</i>)
Seamster v. Blackstock, 5 Am. St. Rep. 262; 2 S. E. R. 36; 83 Va. 232	...	...	...	...	...	...	...	238b, 451, 454
Sears v. Terry, 26 Conn. 273	...	...	...	...	...	...	...	427
Seacor v. Sturgis, 16 N. Y. 548...	...	...	...	...	...	...	...	614, 652, 661
Secretary of State for India in Council v. Hari Bhangi, I. L. R., V Mad., 277	372 c,	372 r	...	...	...	...	...	...
Secretary of State for India in Council v. Kamachee Boye Sahiba, VII M. I. A.	476	...	...	...	...	...	...	372l
Secretary of State for India in Council v. Narayan Balvant Bhosle, 1883	...	...	...	...	...	...	...	...
Bom., P. J. 244	...	...	...	...	...	...	...	372o
Secrist v. Zimmerman, 55 Pa. St. 446	...	...	...	...	...	...	...	127
Semple v. Glenn, 24 Am. St. Rep. 894; 91 Ala. 245	...	...	...	...	...	...	...	207, 476
Serjeant v. Dale, 2 Q. B. D. 658	...	...	...	...	...	...	...	382
Settlemier v. Sullivan, 97 U. S. 444	...	...	...	...	...	...	...	444
Sevey v. Chick, 13 Me. 141	...	...	...	...	...	...	...	234
Sewall v. Robbins, 139 Mass. 164	...	...	...	...	...	...	...	128
Seward v. Heflin, 20 Vt. 144...	...	...	...	...	...	...	...	203
Shadal Khan v. Aminullah Khan, I. L. R., IV All., 92	...	...	...	...	...	...	...	173
Shaefer v. Gates, 38 Am. Dec. 164; 2 B. Mon. Ky. 453	...	...	...	...	...	...	...	166 (<i>Ad.</i>)
Shaffer v. Scuddy, 14 La. Ann. 575	...	...	...	...	...	...	...	64, 68
Shafkatun-nissa v. Shib Sahai, I. L. R., IV All., 171	...	...	...	...	...	...	...	648
Shahbaz Khan v. Dosa Khan, 1888 P. R., No. 163	...	...	...	...	...	...	...	301
Shah Newaz v. Mowaz, 111 P. R., 80	...	...	...	...	...	...	...	116
Shaikh Punju v. Oodoy, XVIII W. R., 537	...	...	...	...	...	...	...	637
Shailapa v. Balapa, I. L. R., VII Bom., 446	...	...	...	...	...	...	...	662
Shallcross v. Smith, 81 Pa. St. 132	...	...	...	...	...	...	...	402
Shama Churn v. Prosunno Coomar, V C. L. R., 251	...	...	...	...	...	...	...	38
Shama Purshad Roy v. Hurro Purshad Roy, X M. I. A., 211	...	...	...	...	...	...	...	106 (<i>Ad.</i>)
Shamasdin v. Ghulam Qadir, 1891 P. R., No. 20	...	...	...	...	...	...	...	395
Shamrav v. Niloji, I. L. R., X Bom., 200	...	...	...	...	...	...	...	405
Sham Singh v. Khark Singh, 1880 P. R., No. 107	...	...	...	...	...	...	...	124
Shangara v. Krishnan, I. L. R., XV Mad., 267	...	...	...	...	...	...	...	162
Shankar Baksh v. Doya Shankar, L. R. XV I. A. 66; I. L. R., XV Cal., 422	12,	109,	659	...	...	...	...	...
Shankara v. Hama, I L. R., II Bom., 470	...	...	...	...	...	...	...	264 (<i>Ad.</i>)
Shankaran v. Kesavan, I. L. R., XV Mad., 6	...	...	...	...	...	...	...	217
Shannon v. Smith, 31 Mich. 452	...	...	...	...	...	...	...	386
Sharon v. Sharon, 72 Cal. 701	...	...	...	...	...	...	...	140
Sharon v. Sharon, 84 Cal. 424	...	...	...	...	...	...	...	523
Sharp v. Findley, 71 Ga. 654	...	...	...	...	...	...	...	166 (<i>Ad.</i>)
Shattuck v. Bascom, 105 N. Y. 39	...	...	...	...	...	...	...	186
Shaw v. Attorney-General, L. R. 2 P. & M. 161...	...	...	...	...	...	...	...	528, 530
Shaw v. Beers, 25 Ala. 449	...	...	...	...	...	...	...	667
Shaw v. Gould, L. R. 3 H. L. 55	...	...	...	...	...	...	...	528
Shaw v. Packett, 26 Vt. 486	...	...	...	...	...	...	...	372g
Shaw v. Padley, 64 Mo. 519...	...	...	...	...	...	...	...	710, 715
Shaw v. R. R. Company, 100 U. S. 605	...	...	...	...	...	...	...	163
Shawhan v. Loffer, 24 Iowa. 217	...	...	...	...	...	...	...	411, 440
Shearman v. State, 28 Am. Rep. 402; 1 Tex. Ct. App. 215	...	...	...	...	...	...	...	479
Sheehy v. Mandeville, 6 Cranch. 253	...	...	...	...	...	...	...	742
Sheik Budan v. Ramchandra, I. L. R., XI Bom., 537	...	...	...	...	...	...	...	763
Sheldon v. Carpenter, 55 Am. Dec. 301; 4 N. Y. 4 (<i>comst.</i>) 579	...	...	...	...	...	...	...	630
Sheldon v. Edwards, 35 N. Y. 279	...	...	...	...	...	...	...	137
Sheldon v. Kibbe, 8 Am. Dec. 176; 3 Conn. 214...	...	...	...	...	...	...	...	755
Sheldon v. Newton, 3 Ohio. 494	...	...	...	...	...	...	...	238a, 240
Sheldon v. Quinlon, 5 Hill, 441	...	...	...	...	...	...	...	401
Sheldon v. Van Vleck, 106 Ill. 45	...	...	...	...	...	...	...	147
Sheldon v. Wright, 26 Pac. R. 946; 5 N. Y. 497...	...	...	...	...	...	...	...	449, 460
Shenandoah Valley Ry. Co. v. Ashby, 19 Am. St. Rep. 898; 86 V. 232	...	...	...	...	...	...	...	...
Sheo Churun v. Fakera, I. L. R., VI Cal., 91; VII C. L. R., 69	...	...	...	...	...	...	...	...

	PAGE
Sheo Devi Ram v. Tulsi Ram, I. L. R., XAV 11., 378...	307
Sheo Lall v. Gunga Ram, VI P. R. 66 No. 27 of 1871	...
Sheoraj v. Kashinath, I. L. R., VII All., 247	...
Sheoraj Mundun Singh v. Deo Nundun Singh, XXIV W. R., 23	...
Sheo Ratan Singh v. Sheo Sahai, I. L. R., VI All., 358	...
Sheo Suhaye v. Bhooree Muhtoon, III W. R., 33	258
Sheo Sunkur Sahoy v. Hridoy Narain, I. L. R., IX Cal., 143; XII C. L. R., 34	643, 661
Shepard v. Wright, 59 How. 512	374
Shephard v. Payne, 12 C. B. (N. S.) 414	256
Sherman v. Dilley, 3 Nev. 21	65, 56 (Ad.)
Sherrard v. Nevius, 52 Am. Dec. 508; 2 Ind. 241	560
Sher Singh v. Daya Ram, I. L. R., XIII All., 564	761
Sherwood v. Baker, 24 Am. St. Rep. 399; 105 Miss. 472	427
Shewan, 1852 Cal. S. D. 405	258
Shibbu Mul v. Paira Singh, XII P. R., 224	61
Shib Kristo Dah v. Abdool Sobhan, XV W. R., 408	667
Shib Nath v. Nubo Kishen, XXI W. R., 189	130
Shideler v. State, 28 N. E. R. 537; 129 Ind. 523	163
Shiels v. Great Northern Ry. Co., 30 L. J. Q. B. 331	366
Shirey v. Musgrave, 29 W. Va. 276	138 (Ad.)
Shivalingaya v. Nagalingaya, I. L. R., IV Bom., 247	193
Shivapa v. Dod Nagaya, I. L. R., XI Bom., 114	201
Shoemaker v. Grant County, 36 Ind. 175	372j
Shokhee Bewa v. Mehdee Mundul, X W. R., 327	111
Short v. Galway, 83 Ky. 501	622 (Ad.)
Shridar Vinayak v. Narayan, XI B. H. C. R. 224	91, 646
Shropshire v. State, 12 Ark. 160	414
Shultz v. Sanders, 33 N. J. Eq. 154	451
Shumway v. Stillman, 6 Wend. 453	438
Shumway v. Stillman, 15 Am. Dec. 374; 4 Cow. (N. Y.) 292	445 (Ad.)
Shuster v. Finan, 19 Kan. 114	412
Sibley v. Waffle, 16 N. Y. 180	475
Sichel v. Boarch, 33 L. J. Exch. 179	344
Sidensparker v. Sidensparker, 83 Am. Dec. 527; 52 Me. 481	236
Sidheswar v. Harihar, I. L. R., XII Bom., 155	317
Sigourney v. Sibley, 32 Am. Dec. 248; 21 Pick. 101	334
Sikur Chund v. Sporing Mull, 1 Hyde, 272	243, 292
Simes v. Zane, 24 Pa. St. 242	623, 629, 655
Simmons v. McKay, 5 Bush. 25	166
Simmons v. Saul, 138 U. S. 439	608
Simpson v. Fogo, 29 L. J. Ch. 657; S. C. On appeal 32 L. J. Ch. 249; 1 H. & M. 195; 8 L. J. N. S. 61	65, 499, 552, 569, 582, 586, 589
Sims v. Dentistry College, 35 Hun. 344	166
Sims v. Gay, 9 N. E. R. 120; 109 Ind. 501	435
Sinclair v. Fraser, 20 How. St. Tr. 469	546
Sinclair v. Sinclair, 13 M. & W. 640	164, 164 (Ad.)
Singarachariar v. Krishnasami, 1 M. L. J. 313	394
Singerly v. Swain, 75 Am. Dec. 581; 33 Penn. St. 102	427
Singleton v. Madison, 1 Bibb, 342	293
Sita Ram v. Amir Begam, I. L. R., VIII All., 324	5, 23, 186
Sitarambhat v. Sitaram Ganesh, VI B. H. C. R. A. C. 250	257
Sitting of Circuit Court Re., 1 New Zeal. Ct. of App. 329	479
Sjoberg v. Nardin, 26 Minn. 501	384
Sketchley v. Smith, 78 Iowa, 542	49
Skinner v. Bailey, 7 Conn. 496	293
Skinner v. East India Co., 6 St. Tr. 710	326
Skoglund v. Minneapolis Street Ry. Co., 22 Am. St. Rep. 733; 45 Minn. 330	634
Slaven v. Wheeler, 58 Tex. 23	388 (Ad.)
Slee v. Bloom, 20 Johns. 669	205
Slocomb v. De Lizardi, 99 Am. Dec. 740; 21 La. Ann. 355	181
Sloman v. Great W. Ry. Co., 18 Ohio, 262	194 (Ad.)
Small v. Haskins, 26 Vt. 209	145
Smith Adm'r v. Rollins, 25 Mo. 408	403
Smith v. Auld, 1 Pac. R. 626; 31 Kan. 262	114
Smith v. Ayrault, 71 Mich. 475	230

TABLE OF CASES.

51

	PAGE
Smith v. Baker, L. R. 8 C. P. 350	52b
Smith v. Bis-Cailuz, 83 Cal. 345	427
Smith v. Black, 11 Am. Dec. 686 ; 9 Serg. & R. 142	744
Smith v. Bowker, 1 Mass. 76	467
Smith v. Britenham, 199 Ill. 540	688, 700
Smith v. Brown, 136 Mass. 416	46 (Ad.)
Smith v. Compton, 3 Barn. & Ad. 407	226g, 228, 232
Smith v. Curtis, 7 Cal. 584	412
Smith v. Foran, 21 Am. Rep. 647 ; 43 Conn. 244	
Smith v. Grady, 31 N. W. R. 477 ; 68 Wis. 215	
Smith v. Great Western Ry. Co., 6 U. C. C. P. 156	
Smith v. Hodson, 78 Me. 180	685 (Ad.)
Smith v. Jones, 15 Johns. 229	614, 622
Smith v. Jones, 10 Johns. 229	
Smith v. Knowlton, 11 N. H. 191	
Smith v. Lathrop, 44 Pa. St., 326...	
Smith v. McDonald, 42 Cal. 484	
Smith v. Moore, 24 Am. Rep. 47 ; 7 S. Car. 209	
Smith v. Myers, 109 Ind. 1	410
Smith v. Nicols, 5 Bing. N. C. 208 ; 8 L. J. C. P. 92	
Smith v. Ontario, 4 Fed. Rep. 386	
Smith v. Patten, 6 Taunt. 115	465,
Smith v. Rines, 3 Sum. 348	
Smith v. Singleton, 39 Am. Dec. 122 ; 2 McMull. 184	
Smith v. Smith, 15 N. H. 55	
Smith v. Smith, 50 N. H. 219	
Smith v. Smith, 22 Iowa, 516	
Smith v. Smith, 79 N. Y. 634	64 (Ad.)
Smith v. Smith, 17 Ill., 482	
Smith v. Traubes Heirs, 1 McLean, 87	
Smith v. Way, 9 Allen, 472	
Smith v. Weeks, 26 Barb. 453	83
Smurr v. State, 105 Ind. 125	478
Snell v. Campbell, 24 Fed. Rep. 880	194
Snowdon v. Craig, 96 Am. Dec. 125 ; 26 Iowa, 156	684b
Snowman v. Harford, 62 Me. 434	684
Sobey v. Beiler, 28 Iowa, 323	56(Ad.)
Solomon v. Newell, 67 Ga. 572	483
Solomon v. Reese, 34 Cal. 28	293 316(Ad.)
Sonaram v. Obhyram, VII Beng. S. D. A. Sel. Rep. 344	262
Soonder Beebe v. Khilloo Mul, II All. H. C. R., 90	616
Soorjomonee Dayee v. Suddanund, XII B. L. R., 304 ; XX W. R., 377 ; L. R. I. A. Sup., Vol. 212	3, 6, 11, 56, 133, 659
Sorrell v. Carpenter, 2 P. Wms. 484	684, 704
Soule v. Hough, 8 N. W. R. 50 ; 45 Mich. 418	468
Souter v. Baymore, 47 Am. Dec. 518 ; 7 Pa. St. 415	144
South N. Ala. R. Co. v. Alabama, 101 U. S. 832	372j
Sowsin v. Solorgue, 14 Mo. App. 486	656
Sparhawk v. Wills, 6 Gray, 163	661
Spaulding v. Homestead Ass'n, 87 Cal. 40	438
Spencer v. Credle, 102 N. C. 68	722
Spencer v. Dearth, 43 Vt. 98	49, 222, 226g, 231(Ad.)
Spencer v. Parsons, 25 Am. St. Rep. 555 ; 89 Kan. 577...	484
Spencer v. Williams, L. R. 2 P. & D. 230	188
Spier v. Corll, 33 Ohio, 236	451
Spivey v. Morris, 52 Am. Dec. 224 ; 18 Ala. 254	756
Spragins v. Taylor, 48 Alla. 520	460
Sprague v. White, 35 N. W. R. 751	715(Ad.)
Sreehuree Bukshee v. Gopal Chunder, XV W. R., 500...	570, 571
Sreenath v. Cally Doss, I. L. R., V Cal., 82	320
Sri Devi v. Kelu Eradi, I. L. R., X Mad., 79	215, 217(Ad.)
Sri Sunkar v. Sidha Lingaya Charanti, I. L. R., II Bom., 473 (n)	244
Stacy v. Thrasher, 6 How. 44	198
Stadler v. Grieben, 61 Wis. 500	642
— v. Entrekin, 144 Ohio, 637	229d

	PAGE
Stancill v. Gay, 92 N. Car. 463 ...	
Stannard v. Hubbell, 123 N. Y. 520	
Stanton v. Embrey, 93 U. S. 548 ...	521
Staples v. Goodrich, 21 Barb. 317 ...	623
Stapleton v. Lee, 132 Mass. 279 ...	
Starbuck v. Murray, 21 Am. Dec. 172 ; 5 Wen. 148 ...	559, 608
Stark v. Stare, 94 U. S. 177... ..	88
Starke v. Wilson, 65 Ala. 576	197
State, <i>ex parte</i> , 52 Ala. 231	72 j, 372 l
State v. Bachelder, 80 Am. Dec. 410 ; 5 Minn. 223 ...	523
State v. Baltimore R. Co., 34 Md., 344	372 d
State v. B. & O. R. R., 34 Md. 344	372 g
State v. Brewster, 7 Vt. 118... ..	466
State v. Burke, 33 La. Ann. 498	372 h
State v. Chester, &c. R. Co., 13 S. C. 290	
State v. Cincinnati Gas Co., 18 Ohio, 262	194 (Ad.)
State v. Clauch, 23 Ala. 85	387
State v. Colerick, 3 Ohio, 487	
State v. Coste, 88 Am. Dec. 148 ; 36 Mo. 437	221 (Ad.), 223, 225
State v. Daniels, 66 Mo. 200	424
State v. Donegan, 12 Mo. App. 190	226 d
State v. Hill, 54 Ala. 67	372 j
State v. Holt, 72 Am. Dec. 273 ; 27 Mo. 340	227
State v. Judge, 21 La. Ann. 733	478 (Ad.)
State v. Lancaster Co. Bank, 8 Neb. 218	
State v. Leckle, 14 La. Ann. 636	
State v. Lewis, 22 N. J. L. 561	425
State v. Little, 1 N. H. 257	486
State v. McBride, 76 Ala. 51	72 (Ad.)
State v. McGlinn, 20 Cal. 273	515 (Ad.)
State v. McIntire, 59 Am. Dec. 566 ; 1 Jones, 1	144
State v. Moore, 19 Ala. 514	287 (Ad.)
State of Rhode Island v. State of Massachusetts, 12 Pet. 657 ...	
State v. Rainey, 74 Mo. 229... ..	
State v. Roberts, 8 Nev. 239... ..	478
State v. Roberts, 108 N. C. 174	289
State v. Ross, 41 Iowa, 467	
State v. Smith, 19 Am. Dec. 679 ; 1 Bailey's L. 283	466, 476
State v. Sneed, 9 Baxt. (Zenn.)	372 h, 372 j
State v. Spikes, 33 Ark. 801... ..	
State v. Stout, 7 Neb. 89	372 j
State v. Tate, 32 Am. St. Rep. 664 ; 109 Mo. 265	403
State of Indiana v. Helmer, 21 Iowa, 370... ..	542
State v. Ward & Briggs, 9 Heisk. 111	
St. Amond v. Gerry, 2 N. & M. 487	316 (Ad.)
St. Carrol v. Commonwealth, 84 Pa. St. 107	478
St. Clair v. Cox, 106 U. S. 350	
St. v. Holmes, 32 Am. Dec. 603 ; 20 Wend. 609	402
St. Joseph Mfg. Co. v. Daggett, 84 Ill. 556	719
St. Louis and S. Coal Co. v. Sandoval Coal Co., 111 Ill. 32	397, 411
St. v. Biggs, 20 Am. St. Rep. 174 ; 52 Ark. 240	642
St. v. Bissell, 46 Mo. 147	228
St. Louis Ry. Co. v. McKursey, 22 Am. St. Rep. 54 ; 78 Tex. 298	
St. Paul National Bank v. Cannon, 24 Am. St. Rep. 189 ; 46 Minn. 95	236
St. Paul R. Co. v. Brown, 24 Minn. 517	372 j
St. James v. Levee Cotton Press Co., 127 U. S. 614	114
St. Sure v. Lindsfelt, 33 Am. St. Rep. 50 ; 82 Wis. 346	532, 608
Steamboat Farmer v. Mc Craw, 31 Ala., 659	236 (Ad.)
Steamship Co. v. Tugman, 106 U. S. 118	415
Stearns v. Wrisle, 30 Vt. 661	202
Steed v. Preece, L. R. 18 Eq. 196	
Steele v. Linchberger, 59 Pa. St. 308	197, 198 (Ad.),
Steele v. Palmer, 41 Miss. 89	
Steele v. Taylor, 1 Minn. 274, 278	710, 711
Stein v. Prairie Rose, 93 Am. Dec. 631 ; 17 Ohio, 471	660, 664
Steinbach v. Relief Fire Ins. Co., 77 N. Y. 498 ; Affirming S. C., 33 Am.	50, 52 a
v. 655 ; 12 Hun. 640 ;	

	PAGE
Stem's Appeal, 44 Pa. St. 396	506
Stephen v. Eiseman, 54 Miss. 535	293
Stephens v. Fox, 83 N. Y. 312	206 (<i>Ad.</i>)
Sternes, <i>ex-parte</i> , 11 Am. St. Rep. 251 ; 77 Cal. 156	440, 475
Stevens v. Gaylord, 11 Mass. 256	554
Stevens v. Lockwood, 28 Am. Dec. 492 ; 13 Wend. 644... ..	652
Stevens v. Miller, 13 Gray. 283	69 (<i>Ad.</i>), 76
Stevenson v. Edwards, 98 Mo. 622	482
Stewart v. Anderson, 8 S. W. R. 294 ; 70 Tex. 588	423
Stewart v. Forbes, Mac. & G. 145	469
Stewart v. Spaulding, 13 Pac. R. 661 ; 72 Cal. 264	403
Stewart v. Stebbins, 30 Miss. 66	29, 48
Stifel v. Lynch, 7 Mo. App. 326	659
Stigers v. Brent, 33 Am. Rep. 317 ; 50 Md. 214 ; 10 Cent. L. G. 473	167
Stilwel v. Swarthout, 81 N. Y. 109... ..	466
Stimpson v. Malden, 109 Mass. 313	466
Stocking v. Hanson, 22 Minn. 405	407
Stockwell v. Township Board, 22 Mich. 349	386
Stoddard v. Johnson, 75 Ind. 31	438, 439
Stoddard v. Myers, 8 Ohio, 203	700
Stoddard v. Thomson, 31 Iowa, 80... ..	159
Stokes v. Morrow, 54 Ga. 597	196
Stone v. Connelly, 71 Am. Dec. 499 ; 1 Mete., (Ky.) 652	696
Stone v. Dickinson, 81 Am. Dec. 727 ; 5 Allen. 29	734, 755
Stone v. Elliott, 11 Ohio, 252	719
Stone v. Wood, 16 Ill. 177	197
Stong v. Insurance Co., 4 Mo. App. 7	234
Stoops v. Woods, 45 Cal. 439	182
Story v. Elliott, 18 Am. Dec. 423 ; 8 Conn. 27	479
Stout v. Lye, 103 U. S. 66	34 (<i>Ad.</i>), 519, 522
Stovall v. Banks, 10 Wall. 583	226r
Stowell v. Chamberlain, 60 N. Y. 272	12 (<i>Ad.</i>)
Strayer v. Johnson, 110 Pa. St. 21	56 (<i>Ad.</i>)
Streeks v. Dyer, 39 Md. 424... ..	152
Strinan Sadagopa v. Kristna Tatachariyar, 1 M. H. C. R., 301 ; 1858 M. S. D. A. D. 250	246
Strong v. Lawrence, 58 Iowa, 56	236
Strong v. Strong, 102 N. Y. 69	52b
Stronsberg v. Republic of Castor Rica, 44 L. T. Rep. 199	372b
Strut v. Beckman, 43 Iowa, 496	153
Stuart v. Allen, 76 Am. Dec. 551 ; 16 Cal. 473	400
Stuart v. Palmer, 74 N. Y. 191	463
Stuart v. Stuart, 3 McArthur, 415... ..	594
Stuart v. Thomas, 45 Mo. 42	226h
Sturges v. Vanderbilt, 73 N. Y. 384	409 (<i>Ad.</i>)
Sturgis v. Rogers, 26 Ind. 1	482, 764
Stuyvesant v. Hone, 1 Sand. Ch. 419.	715
Subba Rau v. Rama Rau, III M. H. C. R. 376	620
Subbaraya v. Krishna, I. L. R., VI Mad., 159	657
Subbaraya Mudali v. The Government, 1 M. H. C. R. 286	357, 359, 360
Subbayya v. Venkatesappa, I. L. R. VI Mad. 49	669
Subbiramaniya v. Velayuda Devar, 1 M. H. C. R., 212... ..	296
Succession of Hoggat, 36 La. Ann. 337	407
Succession of Weigel, 17 La. Ann. 70	238b
Sudharam v. Sudharam, III B. L. R. A. C., 91	262, 264, 264 (<i>Ad.</i>)
Sudduruddin v. Bani Madhub, I. L. R., XV Cal., 145	668
Sufecoolah v. Begum Bibee, XXV W. R., 219	285
Sukee Monee Debia v. Huree Mohum, VI W. R., Civ. Ref. 6	290
Sukh Lal v. Bhikhi, I. L. R. XI All. 187	122
Sullivan v. Blackwell, 28 Miss. 737... ..	414 (<i>Ad.</i>)
Sullivan v. Gilman, 126 Mass. 26	438
Sultan Ahmad v. Maula Bakhsh, I. L. R., IV All. 21	105
Sultan Mahomed v. Kanshi Ram, 1886 P. R., No. 91	280
Sundhya Mala v. Dabi Churn, I. L. R., VI Cal., 715	44
Supervisors v. United States, 4 Wall. 435	482
Surendar Nath Pal v. Brojo Nath Pal, I. L. R., XIII Cal., 352	24, 171, 196 (<i>Ad.</i>)

	PAGE
Suresh Chunder <i>v.</i> Kristo Rangini, I. L. R., XXI. Cal. 249	422 (<i>Ad.</i>)
Sarwar Hossein <i>v.</i> Golam Mahomed, IX W. R., 173	322
Suydam <i>v.</i> Barber, 75 Am. Dec. 254; 18 N. Y. 468	578
Swamscot Machine Co. <i>v.</i> Walker, 22 N. H. 457	167
Swantz <i>v.</i> Pillow, 7 Am. St. Rep. 98; 50 Ark. 300	717
Swearengen <i>v.</i> Gulick, 67 Ill. 212	422
Sweet <i>v.</i> Tuttle, 14 N. Y. 469	150 (<i>Ad.</i>)
Sweet <i>v.</i> Ward, 43 Kan. 695	476
Swift <i>v.</i> Stark, 88 Am. Dec. 463; 2 Or. 97	402
Syad Yar Khan <i>v.</i> Ram Chand, 1882 P. R. No. 24	104
Sykes <i>v.</i> Bonner, 1 Cin. S. Ct. Rep. 464	77, 78
Sykes <i>v.</i> Gerber, 98 Pa. St. 179	50, 613

T

Tadlock <i>v.</i> Eccles, 73 Am. Dec. 213; 20 Tex. 782	144
Talcott <i>v.</i> Rozenberg, 3 Daly. 203	466
Tappan <i>v.</i> Buren, 5 Mass. 196	746
Tappan <i>v.</i> W. & B. Co., 3 Lea 106	372 <i>f</i>
Tarini Prasad <i>v.</i> Khudumani Debia, V B. L. R. 187; XIII W. R., 26	617
Tarini Prasad <i>v.</i> Raghab Chundra, V B. L. R. 184; XIII W. R. 203	617
Tarleton <i>v.</i> Cox, 45 Miss. 430	407
Tarleton <i>v.</i> Johnson, 60 Am. Dec. 515; 25 Ala. 300	235, 236 (<i>Ad.</i>)
Tarleton <i>v.</i> Tarleton, 4 M. & S. 20	546
Taruck Chunder <i>v.</i> Panchu Mohini, I. L. R., VI Cal., 791; VIII C. L. R. 297	663
Taswell <i>v.</i> Stone, 4 Burr. 2455	144
Tate <i>v.</i> Salmon, 79 Ky. 490	372 <i>d</i>
Tates Exe'r <i>v.</i> Hunter, 3 Strob. Eq. 136	160
Taylor <i>v.</i> Adam, 115 Ill. 570	684 <i>a</i>
Taylor <i>v.</i> Atlantic R. Co., 68 Mo. 397	473 (<i>Ad.</i>)
Taylor <i>v.</i> Barnes, 69 N. Y. 430	226 <i>g</i> , 226 <i>h</i>
Taylor <i>v.</i> Barron, 64 Am. Dec. 281; 30 N. H. 78	547, 608
Taylor <i>v.</i> Barron, 35 N. H. 84	200 (<i>Ad.</i>)
Taylor <i>v.</i> Boyd, 17 Am. Dec. 603; 3 Ohio, 337	702
Taylor <i>v.</i> Carryl, 20 How. 583	517, 518
Taylor <i>v.</i> Castle, 42 Cal. 371	12, 52 <i>d</i>
Taylor <i>v.</i> Coots, 29 Am. St. Rep. 426; 32 Neb. 30	458
Taylor <i>v.</i> Elliott, 52 Ind. 588	409
Taylor <i>v.</i> Ford, 22 Eng. W. R. 47; 29 L. T. 392	564
Taylor <i>v.</i> Hall, 71 Tex. 206	372 <i>h</i>
Taylor <i>v.</i> Hunt, 34 Mo. 205	226 <i>d</i>
Taylor <i>v.</i> Jones, 42 N. H. 25	290 (<i>Ad.</i>)
Taylor <i>v.</i> Jones, 2 Atk. 600	719
Taylor <i>v.</i> Kilgore, 33 Ala. 214	622 (<i>Ad.</i>)
Taylor <i>v.</i> Manhattan Ry. Co., 6 N. Y. Sup. 488	635
Taylor <i>v.</i> Phelps, 1 H. & G. 492	603
Taylor <i>v.</i> Taintor, 16 Wall. 366	677
Taylor <i>v.</i> The Royal Saxon, 1 Wall. Jr. C. C. 311	679
Taylor <i>v.</i> Williams, 26 Tex. 583	388 (<i>Ad.</i>)
Tebbetts <i>v.</i> Tilton, 24 N. H. 120	506
Tebbetts <i>v.</i> Tilton, 31 N. H. 273	491, 595
Tedlie <i>v.</i> Dill, 3 Ga. 104	401
Tennell <i>v.</i> Breedlove, 54 Tex. 540	430
Terry <i>v.</i> Drabenstadt, 68 Pa. St. 400	228
Thakur <i>v.</i> Rugnath, 1855 Cal. S. D. 2D.	258
Thanakoti <i>v.</i> Muniappa, I. L. R., VIII Mad., 496	187, 215
Thatchell <i>v.</i> Berney, 65 Ala. 39	200 (<i>Ad.</i>)
Thaw <i>v.</i> Falls, 136 U. S. 519	476
Thayer <i>v.</i> Brooks, 49 Am. Dec. 474; 17 Ohio, 489	325
Thayer <i>v.</i> Carew, 13 Allen, 82	108 (<i>Ad.</i>)
Thayer <i>v.</i> New England Lithographic Co., 108 Mass. 523	205
Thayer <i>v.</i> Tyler, 10 Gray, 164	203
The Charkich, 4 A. & E. 59	372 <i>a</i>
The Davis, 10 Wall. 18	372 <i>d</i>

	PAGE
The Eider, (1893) P. 119 345	345
The Helena, 1 C. Rob. 3 607	607
The Mary, 9 Cranch. 126 497, 524	497, 524
The Mecca, 6 P. D. 106 379	379
The New Hampshire S. Court in Troy v. Cheshire R. R., 55 Am. Dec. 177; 23 N.Y. 83 640	640
The Parlement Belge 372 <i>a</i>	372 <i>a</i>
The Republic, 2 Tex. 616 372 <i>e</i>	372 <i>e</i>
The Rio Grande, 23 Wall. 463 523	523
Thomas v. Hubbell, 69 Am. Dec. 619; 15 N. Y. 405 ... 226 <i>f</i> , 226 <i>g</i>	226 <i>f</i> , 226 <i>g</i>
Thomas v. Joslin, 1 Am. St. Rep. 624; 29 N. W. R. 344; 36 Minn. 1 ... 50, 52 <i>a</i>	50, 52 <i>a</i>
Thomas v. Merrisett, 76 Ga. 384 516(<i>Ad.</i>)	516(<i>Ad.</i>)
Thomas v. Sterns, 33 Ala. 137 198	198
Thompson v. Chicago Ry. Co., 19 S. W. R. 77 466	466
Thompson v. Clark, 4 Hun. 164 185	185
Thompson v. Griffin, 6 S. W. R. 410; 69 Tex. 139 144	144
Thompson v. McKay, 41 Cal. 221 152	152
Thompson v. Myrick, 24 Minn. 4 52 <i>a</i>	52 <i>a</i>
Thompson v. Reno Savings Bank, 3 Am. St. Rep. 858; 19 Nev. 242 206	206
Thompson v. Roberts, 24 How. 241 178 (<i>Ad.</i>)	178 (<i>Ad.</i>)
Thompson v. Schuster, 28 N. W. R. 858 623	623
Thompson v. Whitman, 18 Wall. 457 558, 608	558, 608
Thompson v. Wineland, 11 Mo. 245 69(<i>Ad.</i>)	69(<i>Ad.</i>)
Thoms v. Southard, 26 Am. Dec. 467; 2 Dana, 475 730	730
Thomson v. Howard, 31 Mich. 309 52	52
Thoreson v. Minn. Harvester Works, 13 N. W. Rep. 156; 29 Minn. 341 74	74
Thorn v. Newson, 53 Am. Rep. 747; 64 Tex. 161 29, 48	29, 48
Thorn v. Salmonson, 37 Kan. 441 559	559
Thornton v. Baker, 2 Am. St. Rep. 925; 10 Atl. R. 617; 15 R. I. 553 435	435
Thornton v. Leavitt, 63 Me. 384 414(<i>Ad.</i>)	414(<i>Ad.</i>)
Thornton v. Marginal Ry., 123 Mass. 32 409(<i>Ad.</i>)	409(<i>Ad.</i>)
Thurston v. Spratt, 52 Me. 202 229	229
Thrift v. Delaney, 69 Cal. 188 107(<i>Ad.</i>)	107(<i>Ad.</i>)
Thwing v. Great Western Ins. Co., 111 Mass. 93 50	50
Thyila Kandi Unmatha v. Cheria Kunhamed, 1. L. R., IV Mad., 308 ... 92, 118, 153, 618	92, 118, 153, 618
Tibbetts v. Shapleigh, 60 N. H. 487 746	746
Tidball v. Eichoff, 66 Tex. 58 289	289
Tierney v. Abbott, 46 Wis. 329 113	113
Tilton v. Cofield, 93 U. S. 163 684	684
Tippack v. Briant, 163 Mo. 580 461 (<i>Ad.</i>)	461 (<i>Ad.</i>)
Tirupati v. Narasimha, 1. L. R., XI Mad., 210 644	644
Tobleman v. Hildebrandt, 72 Cal., 313 427	427
Todd v. Gates, 20 W. Va., 464 292	292
Toland v. Tichenor, 3 Rawl., 326 677 (<i>Ad.</i>)	677 (<i>Ad.</i>)
Tolland v. Commr's of Berkshire, 13 Gray, 13 384(<i>Ad.</i>)	384(<i>Ad.</i>)
Tollemache v. Tollemache, 1 Sw. & Tr., 557 530	530
Toller v. Carteret, 2 Vern., 494 336	336
Tompkins v. Tompkins, 1 Story, 547 603	603
Toponidhee Dhirj Gir v. Sreeputy Sahanec, 1. L. R., V Cal., 832 20, 57	20, 57
Torrey v. Pond, 102 Mass., 355 172(<i>Ad.</i>), 179(<i>Ad.</i>)	172(<i>Ad.</i>), 179(<i>Ad.</i>)
Tota Ram v. Har Kishan, 1. L. R., VII All., 224 271	271
Tota Ram v. Ishar Das, 1887 All. W. N., 76 461	461
Towle v. Towle, 46 N. H., 432 226 <i>c</i>	226 <i>c</i>
Town v. Smith, 14 Mich., 348 152	152
Towns v. Nims, 20 Am. Dec., 578; 5 N. H., 263 86, 63 (<i>Ad.</i>)	86, 63 (<i>Ad.</i>)
Townsend v. Cox, 45 Mo., 401 166, 166(<i>Ad.</i>)	166, 166(<i>Ad.</i>)
Townsend v. Masterson S. D. Co., 15 N. Y., 587 461(<i>Ad.</i>)	461(<i>Ad.</i>)
Townsend v. Townsend, 94 Am. Dec., 185; 4 Cold., 70 427	427
Tracy v. Goodwin, 5 Allen, 412 226 <i>e</i> , 227	226 <i>e</i> , 227
Tracy v. Merrill, 103 Mass., 280	
Trafford v. Planc, 36 Ch. D., 609	
Tran v. Gould, 5 Pick., 38	
Tranquebar v. Natambelu, VI M. H. C. R., 234	
Trask v. Hartford & N. H. Railroad, 2 Allen., 331	
Travis v. Topeka S. Co., 42 Kan., 625 115	115
Trayhern v. Colburn, 7 Atl. Rep., 459; 66 Md., 277 37	37

	PAGE
Treadway v. Eastburn, 57 Tex., 209	445
Treasurers v. Bates, 2 Bail. L., 362	742
Treasurers v. Cleary, 3 Rich., 372	372i
Tredway v. Sioux C. P. Ry. Co., 39 Iowa, 197	208
Trego v. Lewis, 58 Pa., 463	316(Ad.)
Trentor v. Pothan, 24 Am. St. Rep. 224; 46 Minn., 298	
Trevivan v. Lawrence, II Sm. L. Cl. 800 (8 Ed.)	
Trikam v. Narayanav, 1878 Bom. P. J., 43	
Trimble v. Boothby, 45 Am. Dec., 526; 14 Ohio, 109	698, 704
Trimble v. Farriss, 78 Ala., 260	128
Troy v. Cheshire Ry. Co., 55 Am. Dec.; 177; 23 N. H., 83	642
Troyer v. Wood, 9 Am. St. Rep., 367; 10 S. W. R., 42; 96 Mo., 478	192, 465
Trumble v. Williams, 24 N. W. R., 716; 18 Neb., 144	458, 460
Trustees of Internal Fund v. Bailey, 10 Fla., 233	386
Tua v. Carriere, 117 U. S., 201	483
Tucker v. Harris, 58 Am. Dec., 488; 13 Ga., 1	427
Tulsi Ram v. Ganga Ram, I. L. R., 1 All., 252	617
Turley v. Turley, 85 Tenn., 251	147
Turnbell v. O. Hara, 4 Yeates., 443	384
Turner v. Crebil, 1 Ohio, 174	
Turner v. Douglass, 52 N. C., 127...	
Turner v. Hitchcock, 20 Iowa, 310	
Turner v. Richmond, 2 Vern., 81	
Turner v. State, 27 Ark., 337	372k
Turpin v. Thomas, 3 Am. Dec., 615; 2 Hen. & M., 139...	233
Tuska v. O'Brien, 68 N. Y., 441	64(Ad.)
Twogood v. Pence, 22 Iowa, 543	127
Two Rivers Mfg. Co. v. Beyer, 17 Am. St. Rep., 131; 74 Wis., 210	240
Tyler Cotton Press Co. v. Chevalier, 56 Ga., 454	293
Tyler v. Thomas, 25 Beav., 47	716
Tyrrell v. Baldwin, 67 Cal. 1; 6 Pac. Rep., 867	160, 200

U

Udaiya Tevar v. Katama Natchiar, II M. H. C. R., 131	89
Ude Ram v. Dayan, 1889 P. R., No. 37	280
Udmi v. Neki, XV P. R., 202	
Udmi v. Raji, 1894 P. R., No. 23	
Uhlfelder, v. Levy, 9 Cal., 607	676(Ad.)
Ukha v. Daga, I. L. R., VII Bom., 182	647
Ulrich v. Ulrich, 3 Mackay, 290	723
Umar Ali v. Shah Ali, V P. R., 164; 1870 P. R., No. 59	43
Umataru Debi v. Krishna Kamini Dasi, II B. L. R. A. C., 102	95, 120
Umed Dholchand v. Pir Saheb, I. L. R., VII Bom., 134	650
Ummatba v. Kunhamed, I. L. R., IV Mad., 338	618
Umrao Lal v. Behari Singh, I. L. R., III All., 297	153
Underwood v. McVeigh, 33 Gratt., 409	462
Union Bank v. Hodges, 11 Rich., 480	742
Union T. Co. v. South Ind. Nav. Co., 130 U. S., 565	684b
Union B. and T. Co. v. Traube, 59 Mo., 355	660
United Society v. Underwood, 21 Am. Rep. 214; 11 Bush., 265	753
United States v. Ames, 100 U. S., 35	743
United States v. Arredonda, 6 Pet., 709	238a, 458
United States v. Benner, 1 Bald., 234	372u
United States, v. Dawson, 15 How., 467	406 (Ad.)
United States v. Hancock, 30 Fed. Rep., 858	489
United States v. Lafontaine, 4 Cranch. C. C., 173	372u
United States v. Lawrence, 13 Blatchf., 306	466
United States v. McDowell, 4 Cranch., 316	290
United States v. Price, 9 How., 83	736, 743
United States v. Throckmorton, 98 U. S., 65	108, 487, 488, 496
United States v. White, 17 Fed. Rep., 561	489
University v. Lassiter, 83 N. C., 38	438 (Ad.)
Uery v. Suit, 91 N. C., 406	289 (Ad.)
Ussalulunissa v. Rahim Buksh, 1861 S. D. A. N. W. P. 30th Sept.	255

V

Vail v. Owen, 19 Barb., 22	...	...	...	...	...	...	...	439
Valentine v. Mahoney, 37 Cal., 393	...	...	...	...	...	...	108, 200(Ad)	
Valsain v. Cloutier, 22 Am. Dec. 179; 3 La., 170	...	...	...	...	...	...	...	198
Vancott v. Prentice, 104 N. Y., 45	...	...	...	...	...	...	...	182
Van Densen v. Sweet, 51 N. Y., 378	...	...	...	...	...	...	...	432
Vanderpoel v. Van Valkenburgh, 6 N. Y., 190	...	...	...	...	...	...	...	516
Van Dolsen v. Abendroth, 43 N. Y., Sup. Ct., 470	...	...	...	...	...	...	...	47
Vanquelin v. Bonard, 15 O. B. N. S. 341; 33 L. J. C. P. N. S. 78; S. C. On appeal.	...	...	...	...	...	...	...
	...	...	...	...	...	...	35 L. J. C. P. 68..... 396, 540, 577	
Varanakot Narayanan v. Varanakot Narayanan. I. L. R., II Mad., 328	...	...	...	...	...	...	...	214
Varner v. Bevil, 47 Ala., 286	...	...	...	...	...	...	...	524
Vasudev v. Vamnaji, I. L. R., V Bom., 80	...	...	...	...	...	...	...	244, 250
Vasudeva v. Madhava, I. L. R., XVI Mad., 326	...	...	...	...	...	...	...	421
Vasudevan v. Narayanan. I. L. R., VI Mad., 121	...	...	...	...	...	...	...	215
Vaughan v. Northup, 15 Pet., 1	...	...	...	...	...	...	...	517
Vaughan v. Morrison, 55 N. H., 580	...	...	...	...	...	...	...	86
Vaughan v. Weldon, I. L. R. 10 C. P., 47	...	...	...	...	...	...	...	314, 627
Veach v. Rice, 9 S. C. R. 730; 131 U. S., 293	...	...	...	...	...	...	...	482
Venable v. Curd, 2 Head, 582	...	...	...	...	...	...	...	478
Vengamuthu v. Pandaveswara, I. L. R., VI Mad., 151	...	...	...	...	...	...	...	249
Venkata v. Krishnasami, I. L. R., VI Mad., 344	...	...	...	...	...	...	...	340
Venkatachalam v. Mahalakshamma, I. L. R., X Mad., 272	...	...	...	...	...	...	...	123
Venkatachalan v. Thimma Naikan, V M. H. C. R., 64	...	...	...	...	...	...	...	296
Venkatachalapati v. Krishna, I. L. R. XIII Mad., 287	...	...	...	...	...	...	...	277
Venkatachalapati v. Subbarayadu, I. L. R., XIII Mad., 293	...	...	...	...	...	...	...	249
Venkataadri Apparow v. Narayya Apparow, IX M. J., 288	...	...	...	...	...	...	...	33
Venkatesh v. Maruti, I. L. R., XII Bom., 217	...	...	...	...	...	...	...	697, 706
Venkatramanna v. Viramma, I. L. R., X Mad., 17	...	...	...	...	...	...	...	485
Venkayya v. Narasamma, I. L. R. XI Mad. 204	...	...	...	...	...	...	...	149, 173
Venkayya v. Suramma, I. L. R., XII Mad., 235	...	...	...	...	...	...	...	193
Venkoba v. Subbanna, I. L. R., XI Mad., 151	...	...	...	...	...	...	...	642
Venktesh v. Ganpaya, 1876 Bom., P. J. 110	...	...	...	...	...	...	...	174
Venku v. Mahalinga, I. L. R., XI Mad., 393	...	...	...	...	...	...	...	32
Verhein v. Stickbein, 57 Mo., 326	...	...	...	...	...	...	...	113 (Ad.)
Very v. McHenry, 29 Me., 206	...	...	...	...	...	...	...	506
Vijaya Ragava v. Secretary of State for India, I. L. R.; VII. Mad....	...	...	...	...	...	...	...	372*
Vineyard v. Lynch, 86 Mo., 684	...	...	...	...	...	...	...	293
Viraragava v. Krishnasami, I. L. R., VI Mad., 344	...	...	...	...	...	...	...	619
Vishnu Sukharam v. Krishnarao, I. L. R., XI Bom., 153	...	...	...	...	...	...	...	317, 471
Vithalrao v. Vaghoji, I. L. R., XVII Bom., 570	...	...	...	...	...	...	...	340
Vithal Krishna v. Anantram, XI B. H. C. R., 6	...	...	...	...	...	...	...	257
Vithilinga Padayachi v. Vithilinga Mudali, I. L. R., XV Mad., 111	...	...	...	...	...	...	...	394, 394(Ad.)
Vogel v. Brown Township, 2 Am. St. Rep., 187; 112 Ind., 299	...	...	...	...	...	...	...	465
Voinot v. Barrett, 55 L. J. Q. B., 39; 34 Eng. W. Rep., 161	...	...	...	...	...	...	...	569
Voorhees v. Jackson, 10 Pet., 474	...	...	...	...	...	...	...	482(Ad.)
Voorhees v. United States Bank, 35 U. S., 149	...	...	...	...	...	...	...	474
Vosler v. Brock, 84 Mo., 4 57	...	...	...	...	...	...	...	485
Vyankatray v. Mahadev, 1882 Bom. P. J., 226	...	...	...	...	...	...	...	214
Vyadinatha v. Subramanya, I. L. R., VIII Mad., 235	...	...	...	...	...	...	...	304
Vythilinga v. Vijayathammal, I. L. R., VI Mad., 43	...	...	...	...	...	...	...	147, 187

W

Wadleigh v. Veasie, 3 Sum., 165	...	...	...	...	...	...	...	682
Wadsworth v. Connell, 104 Ill., 369	...	...	...	...	...	...	...	138
Wagner v. Wagner, 36 Minn., 239	...	...	...	...	...	...	...	50
Wahid Ali v. Nauth Tooraho, XXIV W. R., 128	...	...	...	...	...	...	...	201
Wahle v. Wahle, 71 Ill., 510	...	...	...	...	...	...	...	128
West Riding Local Board of Health v. West Riding and Grimsby R. Co., 1 Q.	...	...	...	...	...	...	...
	...	...	...	...	...	...	...	413
Waldrop v. Leonard, 22 S. C., 118	...	...	...	...	...	...	...	467
Wales v. Jones, 1 Mich., 253	...	...	...	...	...	...	...	674 (Ad.). 677(Ad.)

	PAGE.
Walker v. Douglas, 89 Ill. 425	684a
Walker, <i>ex parte</i> , 25 Ala. 81	288b
Walker v. Hill, 111 Ind., 223,	398(Ad.)
Walker v. Perryman, 23 Ga., 314	
Walker v. Smallman, Amb., 677	
Walker v. State, 102 Ind. 502	
Wall v. Wall, 10 Am. St. Rep., 549 ; 123 Pa. St., 545	397
Walling v. Beers, 120 Mass., 548	414, 415
Walmesley v. Mendolsohn, 31 La. Ann., 152	226e
Walsh v. Durkin, 12 Johns, 99	682
Walters v. Wood, 16 N. W. R., 116 ; 61 Iowa, 290	157
Walton v. Carr, 67 Ind. 164	228
Wamsley v. Robinson, 28 La. Ann., 793	
Wann v. McNulty, 43 Am. Dec. 58; 2 Gill., 355	
Wanzer v. De Baum, 1 E. D. Smith (N. Y.), 261	
Ward v. Day, 4 B. & S., 337	52b
Ward v. Hartford Co., 12 Conn., 404	720
Ward v. Johnson, 113 Mass., 148	743
Ward v. Lowndes, 2 S. E. R. 591, 96 N. C., 367	467
Ward v. Southfield, 102 N. Y., 537	490
Ware v. Percival, 14 Am. Rep. 565 ; 61 Me., 591	52
Ware v. Richardson, 56 Am. Dec. 762 ; 3 Ind., 505	128(Ad.)
Warren v. Crane, 50 Mich., 301	415
Warren v. Kingsmill, 8 Q. B. Up. Can., 407	557
Warrender v. Warrender, 2 Cl. & F., 541	529, 531
Washburn v. Great Western Ins. Co., 114 Mass., 175	50, 52a
Washburn v. Stoenwick, 32 Minn., 327	700
Wash Ins. Co. v. Price, 1 Hopk. Ch., 1	384
Washington v. Black, 83 Cal., 290	427
Washington Packet Co. v. Sickles, 5 Wall., 592	131, 129
Watson v. Cone, 86 Ill. 46	414(Ad.)
Waterbury v. Mather, 16 Wend., 611	467
Waterhouse v. Cousins, 40 Mo., 333	442
Waters v. Bates, 44 Pa. St., 473	460
Watkins v. Holman, 16 Pet., 25	337
Watson v. Bank, 3 Bxt., 476	372b
Watson v. Collector Raj Shabyc, XII M. I. A. 160 ; III B. L. R. P.C. 43; XII W. R. P. C., 43	121
Watson v. Dowling, 26 Cal., 124	686, 710
Watson v. Jones, 13 Wall., 713	518
Watson v. Jones, 11 Am. Law. Reg., 430	675
Watson v. Van Meeter, 43 Iowa, 76	635
Watson v. Wetter, 91 Pa. St., 385	461 (Ad)
Watson v. Wilson, 26 Am. Dec. 459 ; 2 Dana, 406	690, 698, 705, 706 (Ad)
Watt v. Brookover, 29 Am. St. Rep., 811 ; 35 W. V. 327	
Watter v. Rucker, 1 Brod. & B., 491	
Wattles v. Hyde, 9 Conn. 10	
Watts v. Harding, 15 Tex., 386	292 (Ad)
Way v. Lewis, 115 Mass., 26	226c
Wazeer Mahton v. Chuni Singh, I. L. R., VII Cal., 727 ; IX C. L. R., 377	125
Wazir Singh v. Ganga Ram, 1889 P. R., No. 30	280
Weaver v. Brenner, 21 Atl. R., 1010	167
Weaver v. Brown, 87 Ala., 533	435
Weaver v. Carpenter, 42 Iowa, 343	465
Webb v. Buckelew, 82 N. Y., 555	140
Webster v. County of Washington, 26 Minn., 220	384
Webster v. Daniel, 14 S. W. R., 559 ; 47 Ark., 131	466
Webster v. Page, 6 N. W. Rep., 716 ; 54 Iowa, 461	166
Webster v. Randall, 19 Pick, 13	677(Ad.)
Webster v. Reid, 11 How., 437	448
Wedderburn v. Wedderburn, 4 My. & Cr., 596	680, 681
Wehrly v. Morfoot, 103 Ill., 183	661
Weil v. Summons, 66 Mo., 617	403
Weinberger v. Merchants' Ins. Co., 4 La. Ann., 31	114

TABLE OF CASES.

59

	PAGE.
Weiss v. Guérineau, 109 Ind., 438	488
Welch v. Karstens, 60 Ill., 117	316(Ad.)
Welch v. Kinsland, 93 N. Car., 281	138(Ad.)
Welch v. Nash, 8 East., 394; 9 R. R., 478	416, 439
Welch v. Sykes, 44 Am. Dec., 689; 3 Gil., 197	560
Welcome v. Batchelder, 23 Me., 85	385(Ad.)
Wells v. Moore, 49 Mo., 229	113
Wells v. Stearns, 33 Hun., 323	451
Welsh v. Kirkpatrick, 89 Am. Dec., 85; 30 Cal., 202	467
Wenman v. Mackenzie, 5 El. & B., 447	200
Werges v. St. Louis Ry. Co., 35 La. Ann., 641; 40 Ind., 444	642
Wernecke v. Wood, 58 Mo., 352	403
West v. Bagby, 62 Am. Dec., 512; 12 Tex., 34	140
West v. Furbish, 67 Me., 17	746
West v. Jordan, 62 Mo., 484	407
Westcott v. Bridwell, 40 Mo., 146	404
West Feliciana R. R. Co. v. Thornton, 68 Am. Dec., 778; 12 La. An., 736	482
West v. Wheeler, 49 Mich., 505	386
Western U. T. Co. v. Dickinson, 13 Am. Rep., 295; 40 Ind., 444	368
Western U. T. Co. v. Taylor, 84 Ga., 408	411
Wey v. Halley, 6 Mod., 194	327
Weyer v. Zane, 3 Ohio, 305	542
Wheelock v. Lee, 74 N. Y., 495	410 (Ad), 414(Ad.)
Wheelwright v. Depeyster, 3 Am. Dec., 345; 1 Johns., 471	523
Whicker v. Hume, 7 H. L. 124	514
Whipple v. Robbins, 97 Mass., 107	203
Whitaker v. Bramson, 2 Paine, 209	674
Whitaker v. Hawley, 30 Kan., 317	
Whitcomb v. Williams, 4 Pick., 228	
White, <i>ex parte</i> , 37 Am. Rep., 466; 15 Nev., 146	
White v. Bucolench, L. R., 1 H. L. So., 70	
White v. Brownstein, 35 Hun., 68	51 (Ad.)
White v. Chase, 128 Mass., 158	56 (Ad.)
White v. Coatsworth, 6 N. Y., 139	180 (Ad.)
White v. Foote L. & M. Co., 6 Am. St. Rep. 650; 29 W. V. 385	398 (Ad.)
White v. Governor, 18 Ala., 767	372d, 372i
White v. Jones, 38 Ill., 159	451
White v. Merritt, 57 Am. Dec., 527; 7 N. Y., 352	78, 486
White v. Morse, 139 Mass., 162	
White v. Moseley, 8 Pick. 356	
White v. Philbrick, 17 Am., Dec. 214; 5 Greenleaf, 147	
White v. Riggs, 27 Me., 114	
White v. Simonds, 78 Am. Dec., 620; 33 Vt., 178	
White v. Smith, 75 Am. Dec. 589; 33 Pa. St. 186	
White v. Weatherbee, 126 Mass., 450	226 d
White v. Whitman, 1 Curtis, 494	679, 682
Whiteside v. Haselton, 110 U. S., 296	684a
Whitford v. Crooks, 20 N. W. R., 45; 54 Mich., 261	163
Whitley v. Black, 11 Am. Dec. 753; 2 Hawks, 179	398(Ad.)
Whitney v. Clarendon, 46 Am. Dec., 150; 18 Vt., 252	51
Whitney v. Porter, 23 Ill., 415	
Whitney v. Town of Clarendon, 46 Am. Dec., 150; 18 Vt., 252	
Whittaker v. Forbes, 10 C. P., 583	327a, 328
Whittlesey v. Frantz, 74 N. Y., 456	242
Whyte v. Gibbes, 20 How. 541	412 (Ad.)
Wickliffe's Heirs v. Breckenridge's Heirs, 1 Bush, 443	705, 706
Wierich v. DeZoya, 7 Ill., 385	108
Wigand v. Dejonge, 8 Abb. New. Ca., 260	388
Wight v. Wallbaum, 39 Ill., 554	526
Wilayati Begam v. Nurkhan, L. L. R., V All., 514	39
Wilcher v. Robertson, 78 Va., 602	237
Wilcox v. Kassick, 2 Mich., 165	674
Wildman v. Rider, 23 Conn., 172	420 (Ad.)
Wile v. Brownstein, 35 Hun., 68	52b

	PAGE.
Wiley v. Pratt, 23 Ind. 628, 635...	437, 438
Wilkerson v. Schoonmaker, 19 Am. St. Rep., 803; 77 Texas., 615 ...	428, 429
Wilkes v. Jackson, 2 Hen. & M., 355 ...	753
Wilkinson v. Elliott, 19 Am. St. Rep., 158; 43 Kan., 590 ...	695, 723
Wilkinson v. Hall, 6 Gray, 568...	203, 603
Wilkinson v. Stuart, 74 Ala., 198 ...	518
Willard v. Collamer, 34 Vt., 594 ...	292 (Ad.)
Williamport R. Co. v. Com., 35 Pa. St., 288 ...	372d
Williams v. Ayrault, 31 Barb., 364 ...	682(Ad.)
Williams v. Ball, 36 Am. Rep., 730; 52 Tex., 603 ...	427, 434
Williams v. Benedict, 8 How., 107 ...	517, 520
Williams v. Cammack, 61 Am. Dec., 508; 27 Miss., 209 ...	432
Williams v. Chalfant, 82 Ill., 218 ...	401
Williams v. Engersoll, 89 N. Y., 508 ...	516 (Ad.)
Williams v. Fitzhugh, 44 Barb., 321 ...	49
Williams v. Haynes, 19 Am. St. Rep., 752; 77 Texas, 288 ...	428, 429, 492
Williams v. Hudson, 93 Mo., 524 ...	403
Williams v. Johnson, 34 Am. St. Rep., 513; 112 N. Car. 424 ...	438 (Ad.)
Williams v. Jones, 13 M. & W., 633 ...	544
Williams v. Noble Brothers, 36 Ga., 599 ...	392 (Ad.)
Williams v. Preston, 20 Am. Dec., 179, 3 J. J. Marsh., 600 ...	547
Williams v. Saunders, 5 Cold., 60 ...	603
Williams v. Sutton, 43 Cal., 71 ...	196
Williamson v. Berry, 8 How., 540 ...	556
Williamson v. Williamson, 71 Me., 442...	228
Williamson v. Wright, Tex. Unreported cases, 711 ...	457
Wills v. Slude, 6 Ves., 498 ...	192 a
Wilson v. Buell, 20 N. E. R., 231; 117 Ind., 315 ...	743, 744
Wilson v. Ferrand, 13 Eq. 362 ...	682
Wilson v. Pittsburgh Coal Co., 44 Pa. St., 424 ...	205 (Ad)
Wilson v. Ruiney, 74 Mo., 229 ...	208
Wilson v. Wilson, 2 P. M., 435 ...	530
Wilton v. Middlesex Ry. Co., 125 Mass., 130 ...	636
Wimbish v. Breeden, 77 Va., 324 ...	476
Wimer v. Wimer, 3 Am. St. Rep., 126; 82 Va., 890 ...	338, 400
Winchell v. Coney, 27 Fed. Rep., 482 ...	52b
Winchester v. Beardin, 51 Am. Dec., 702; 10 Humph., 247 ...	402
Winchester v. Hoiskell, 119 U. S., 450 ...	159
Winchester v. Hinsdale, 12 Conn., 88 ...	385 (Ad.)
Windsor v. McVeigh, 93 U. S., 282 ...	454, 461, 495
Wingate v. Haywood, 40 N. H., 438 ...	420, 432
Winnibish v. Breeden, 77 Va., 324 ...	620
Winpenny v. Winpenny, 92 Pa. St., 440 ...	56 (Ad.)
Winslow v. Stokes, 67 Am. Dec., 242; 3 Jones' Law, 285 ...	482, 620
Winston v. Westfeldt, 58 Am. Dec. 278; 22 Ala., 760 ...	718, 718(Ad)
Winterfield v. Bradum, 3 Q. B., 326 ...	372f
Winters v. Means, 13 Am. St. Rep., 489; 25 Neb., 241 ...	379, 438
Wisconsin v. The Pelican Ins. Co., 127 U. S. (20 Davis), 265 ...	601
Wisconsin Cent. Ry. Co. v. Wisconsin River Sand Co., 71 Wis., 94...	708 (Ad.)
Wiseman v. Witherow, 90 N. C., 140 ...	289
Withers v. Patterson, 86 Am. Dec., 643; 27 Tex., 491 ...	435, 527
Wixom v. Stephens, 97 Am. Dec., 205; 17 Mich., 518 ...	737
Wohlford v. Campton, 79 Va., 233 ...	127 (Ad.)
Wohlfinger v. Betz, 66 Iowa, 594 ...	200 (Ad.)
Wood v. Bayard, 63 Pa. St., 320...	166 (Ad.)
Wood v. Blythe, 1 N. W. R. 341; 46 Wis., 650 ...	451
Wood v. Busel, 63 Mo., 193 ...	158(Ad.), 163
Wood v. Gamble, 59 Am. Dec. 135; 11 Cush., 8 ...	34 (Ad.)
Wood v. Jackson, 8 Wend., 9 ...	512
Wood v. Lake, 13 Wis., 84 ...	677 (Ad.)
Wood v. Watkinson, 44 Am. Dec. 562; 17 Conn., 500 ...	578 (Ad.)
Woodbridge v. Banning, 14 Ohio, 328 ...	114
Woodbury v. Maguire, 42 Iowa, 339 ...	489
Woodhams v. Newman, 7 C. B. 604 18 L. J. C. P. 213; 13 Jur., 456 ...	291

	PAGE.
Woodhouse v. Fillbates, 77 Va., 317	483
Woodin v. Clemons, 32 Iowa, 280	152
Woodland v. Newhalls' Adm'r; 31 Fed. Rep., 434	52 d
Woodruff v. Taylor, 20 Vt., 65	496, 499
Woods v. Montevallo C. & T. Co., 5 Am. St. Rep. 393; 84 Ala., 560	184
Woodward v. Hill, 6 Wis., 143	72
Wooldridge v. Boyd, 13 Lea., 151	702
Woomatara Debia v. Unnopoorua Dasi, XI B. L. R. 158; XVIII W. R., 163	65, 94
Worsley v. The Earl of Scarborough, 3 Atk., 392	688, 720
Wortham v. Boyd, 66 Tex., 401... ..	648 a, 696
Wright v. Andrews, 130 Mass., 149	401, 402, 414, 558, 560
Wright v. Boynton, 37 N. H., 9... ..	414
Wright v. Card, 19 Atl. R., 709	455
Wright v. Douglass, 10 Barb., 97	427, 440, 444 (Ad.)
Wright v. Hagen, 24 Vt., 143	427 (Ad.)
Wyatt v. Rambo, 29 Ala., 510	203
Wyatt's Adm'r v. Steele, 26 Ala., 639	485

X

Xiques v. Bujac, 7 La. Ann., 515	208
---	-----

Y

Yamunabai v. Narayan, I L. R., I Bom., 164	267
Yankey v. Swaney, 5 Ky., 55	113
Yaple v. Titus, 80 Am. Dec., 604; 41 Pa. St., 202	406, 411
Yarakalamma v. Naramma, II M. H. C. R., 276	493, 501
Yar Khan v. Ram Chand, 1882 P. R., No. 24	104
Yateman v. Savings Institute, 65 U. S., 764	686, 687 (Ad.)
Yates v. Smith, 11 Brad., 549	711
Yeatman v. Savings Inst. 95 U. S., 764	687 (Ad.)
Yellapa v. Mankia, VIII B. H. C. R. A. C., 37	262
Yenkoba v. Rambhaji, IX B. H. C. R., 12	321, 340
Yoho v. M. Govern, 42 Ohio, 11	746
Yon v. Baldwin, 76 Ga., 769	711
Yonley v. Lavender, 21 Wall., 276	520
Yorks v. Steele, 50 Lab., 397	283
Young, <i>ex parte</i> , 17 Ch. D., 668	219, 222 (Ad.), 225, 238
Young v. Babillon, 91 Pa. St., 280	182
Young v. Brehe, 3 Am. St. Rep. 892; 19 Nev., 379	180 (Ad.), 144 (Ad.), 147
Young v. Cardwell, 6 Lea., 171... ..	686, 687 (Ad.)
Young v. Lorain, 52 Am. Dec. 463; 11 Ill., 624	459
Young v. Pickens, 45 Miss., 553... ..	407
Young v. Ross, 31 N. H., 205	414
Young v. Sellers, 106 Ind., 101	476
Youngman v. Elmira R. R. Co., 65 Pa. St., 278	685, 710

Z

Zalem v. Gobindgeer, I L. J. (O. S.), 85	349
Zamindar of Pittapuram v. Kolanka, L. R. V I. A. 200; I. L. R., II Mad., 23	170
Zane v. Fink, 18 W. V., 730	686
Zuberbier v. Morse, 36 La. Ann., 970	293

LAW OF RES JUDICATA.

CHAPTER I.

GENERAL VIEW OF THE DOCTRINE.

THE doctrine of *res judicata* is of universal application, and, in fact, “a fundamental concept in the organization of every jural society.”

Universal character of the doctrine of *res judicata*.

“Justice requires that every cause should be once fairly tried, and public tranquillity demands that having been tried once, all litigation about that cause should be concluded for ever between those parties.” “The maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth.”¹ If it were not for the conclusive effect of all such determinations, there would be no end of litigation—and no security for any person; the rights of parties would be involved in endless confusion, and great injustice often done under cover of law; while the Courts, stripped of their most efficient powers, would become little more than advisory bodies; and thus the most important function of Government—that of ascertaining and enforcing rights—would go unfulfilled.²

From the earliest times, therefore, the Courts have followed and acted upon the rule of the conclusiveness of judgments—the rule under which a judgment in a suit on any point is conclusive as to that point in every subsequent suit between persons who were parties to the former suit, under which they “cannot canvas the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment, and was not urged.”³ Even the discovery at the time of the subsequent suit, of evidence which was not forthcoming at the time of the former suit, will not

¹ *Jeter v. Hewitt*, 22 How. 312, per Campbell, J.

² Bl. Jun. 600

³ *Greathhead v. Bromley*, 7 T. B. 450.

avoid the bar of *res judicata*, and a judgment-debtor cannot collaterally impeach the judgment even by written receipts for payment which have been since discovered:⁴ “*Sub specie novorum instrumentorum postea repertorum res judicata restaurari exemplo quare est.*”

2. The term *res judicata* is derived from the Roman law, and, in its most obvious and general meaning, it signified at Rome, as it signifies in England and in America, that a matter in dispute had been considered and settled by a competent court of justice. A judgment of a Court among the Romans always operated as a novation of the original cause of action, which was deemed to merge in it, and of which it was said, *transit in rem judicatum*. This effect did not attach, however, to the judgments of the Prætor's Court, which were regarded as Foreign judgments, but allowed to be pleaded by way of confession and avoidance against a claim on the original cause of action; and by the time of Justinian, this plea came to be used to repel all the claims adjudged by the judicial tribunals. Every judgment was allowed a conclusive effect on the ground, *Res judicata pro veritate accipitur*; and so conclusive was the effect that it was said, “*res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum.*” It was necessary that the subject-matter of the former litigation should be the same as in the new suit, and the parties the same and litigating in the same character, except that the judgment was available by or against those also who might have succeeded as privies to the rights of the parties in the former suit. The conclusiveness of the judgment extended to every point necessarily decided; and it was not necessary that the former cause of action should have been the same as the second, except when that cause of action was itself the subject of dispute, it being ordinarily considered enough that the matter in dispute in the two suits was the same. The details of the doctrine as recognized among the Romans need not be explained here. *Interest reipublicæ ut sit finis litium* was an ordinary principle of Roman jurisprudence, though the doctrine of *res judicata* may be more immediately based on the equally well-known maxim, “*nemo debet bis vexari pro eadem causa.*”⁵ These maxims, having stood the test of centuries, still retain their original place in the jurisprudence of every civilized country of to-day. Lord Coke, in a note to *Ferrer's*

⁴ *Marriott v. Hampton*, 7 T. R. 260.

⁵ *Muhammad Salim v. Nabian Bibi*, I. L. R. VIII. All. 265.

case, observed that it had been well said, “*interest reipublicæ ut sit finis litium*—otherwise great oppression might be done under colour and pretence of law.” Lord Blackburn, in *Lockyer v. Ferryman*,⁶ refers to both these bases of the doctrine, though the doctrine, as recognised in English jurisprudence, is not, as in the Continental Countries of Europe,^a taken directly from the Roman Law.

3. The doctrine of *res judicata* has long been recognized in England with greater or less distinctness. English notion of the doctrine. “The rule of the ancient Common Law,” Bowen, L. J., said in *Brunsdon v. Humphrey*,⁷ “is, that where one is barred in any action real or personal by judgment, demurer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever.” The rule has been enunciated in England, as observed by their Lordships of the Privy Council, in the case of *Soorjo Monee Dayee v. Suddanund*,⁸ in “a series of cases with which the profession is familiar. It has probably never been better laid down than in *Gregory v. Molesworth*,⁹ in which Lord Hardwicke held, that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes¹⁰ of Mr. Smith to the case of the *Duchess of Kingston*.” It is, in fact, the rule as laid down in the *Duchess of Kingston’s case* that has acquired an authoritative character in every country that has adopted or followed English jurisprudence. In that case, Sir William De Grey, C. J., delivering the unanimous opinion of the Judges present, stated the rule in the following terms:—“From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true—first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the

^a The French Civil Code, Art. 1351, thus provides that *Chose Jugée* has place only with regard to the object of the judgment, and requires that the matter demanded be the same, the demand be founded upon the same cause, and formed by and against the same parties in the same capacity.

⁶ L. R. 2 Ap. Ca. 530.

⁷ 14 Q. B. D. 146.

⁸ XII B. L. R. 304.

⁹ Atkyns, 626.

¹⁰ Sm. L. O. 601 (8th Ed.).

same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose; but neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

Some years later, in *Outram v. Morcuod*¹¹ Lord Ellenborough, C. J., said: "A recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title: and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

4. The real character of the doctrine has been, to some extent, thrown into the back-ground in England by its treatment as a branch of the law of estoppel, which it resembles only in the circumstance that both exclude contradictory evidence, and from which it differs chiefly in not resulting from an act of a party himself as an estoppel does. The inappropriateness of this mode of treating the doctrine has often been pointed out, and a mistake that resulted from it in practice was that it came to be held in some cases that the plea of *res judicata*, unless pleaded in bar, could not be given in evidence, and was to be considered as waived like other estoppels.¹² The good sense of the Judges prevailed, however, and the proposition was denied in its application to judgments, as the estoppel arising from an act of the party himself is allowed

¹¹ 3 T. R. 246

¹² *Ward v. M'Call*, 14 Mass. 241.
Clarks v. Furness, 17 Mass. 365.

for the benefit of the other party which he may waive; but the whole community have an interest in holding the parties conclusively bound by the results of their own litigation.^{6,13}

The distinction between the doctrines of *res judicata* and of estoppel was explained very clearly by Mr. Justice Mahmood in *Sitaram v. Amir Begam*.¹⁴ "That the effect of the plea of *res judicata*," said the learned Judge, "may, in the result, operate like an estoppel, by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted." But here the similarity between the two rules virtually ends, and it is equally clear that the *ratio* upon which the doctrine of estoppel, properly so called, rests, is distinguishable from that upon which the plea of *res judicata* is founded. The essential features of estoppel are those which have found formulation in Sec. 115 of the Evidence Act, the provisions of which proceed upon the doctrine of equity, that he who by his declaration, act, or omission has induced another to alter his position, shall not be allowed to turn round and take advantage of such alteration of that other's position. All the other rules to be found in Chapter VIII of the Evidence Act, relating to the estoppel of tenant, or of acceptors of bills of exchange, bailees or licensees, proceed upon the same fundamental principles. On the other hand, the rule of *res judicata* does not owe its origin to any such principle, but is founded upon the maxim, *nemo debet bis vexari pro una et eadem causa*—a maxim which is itself an outcome of the wider maxim, *interest reipublice ut sit finis litium*. The principle of estoppel, as I have already said, proceeds upon different grounds, and I think the framers of the Indian Codes of procedure acted upon correct juristic classification in dealing with the subject of *res judicata* as appertaining to the province of procedure properly so called. Perhaps the shortest way to describe

⁶ "Kennedy, J., in *Marsh v. Parr*,¹² after pointing out the pernicious effects of a contrary doctrine, says: "The effect of a judgment of a Court having jurisdiction over the subject matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, &c., which may or may not be enforced at the election of the other party, because whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper Court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the Courts and juries ever afterwards, as long as it shall remain in force and unreversed."

¹² Gr. Ev. I 667.

¹³ I. L. R. VIII. All. 332.

¹⁴ 26 Am. Doj. 121.

the difference between the plea of *res judicata* and an estoppel is to say that whilst the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party, who, relying upon those declarations or acts, altered his position. In other words, *res judicata* prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence. Further, the theory of *res judicata* is to presume by a conclusive presumption that the former adjudication declared the truth, whilst an estoppel, to use the words of Lord Coke, is where a man is concluded by his own act or acceptance to say the truth, which means he is not allowed in contradiction of his former self to prove what he now chooses to call the truth. Thus the plea of *res judicata* proceeds upon grounds of public policy properly so called, whilst an estoppel is simply the application of equitable principles between man and man, two individual parties to a litigation."

5. The substance of the rule as enunciated and recognised in England was, however, approved of and acted upon in numerous cases by the Judges, and imported almost *res integra*, in this country. Long before the enactment of a complete Code of Civil Procedure in India it was laid down as a general rule, that "a Court cannot entertain any cause which shall appear to have been heard and determined by any Judge before."¹⁶ Even after the enactment of the Civil Procedure Code of 1859, their Lordships of the Privy Council acted expressly upon the English rule in *Soorjomonee Dayce v. Suddanund*.¹⁷ They referred to that rule with approval in *Krishna Behari Roy v. Brojeswari*¹⁸, observing that "by the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them." And in *Khugowlie Singh v. Hussein Bux*¹⁹ their Lordships observed, as to the statement of the rule in the *Duchess of Kingston's* case, that there was

nothing “technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil Law and it is perfectly consistent with Sec. 2 of the Civil Procedure Code of 1859.”

6. The statement of the rule in Sec. 2, while perfectly consistent with that in the *Duchess of Kingston's case*, was not identical with, and fell considerably short of it. It enacted only that “the Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit, between the same parties or between parties under whom they claim.” It thus provided only for that portion of the doctrine of *res judicata* which relates to what is designated bar by judgment, and which really imports the bar of a suit by a judgment on the merits in a former suit on the same cause of action. The Supreme Court of Massachusetts said in *Foster v. Richard Busteed*²⁰ that “the doctrine of *res judicata* amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal.” It is no doubt this aspect of the doctrine of *res judicata* that is first recognized in the growth of juristic administration, but in later stages it can, only by a loose use of the language, be said to cover the whole extent of the application of that doctrine.

7. Section 2 left unnoticed and ignored the remaining portion of the doctrine, the portion relating to the bar of the trial of an issue by judgment on that issue, the portion that has often, though not quite correctly, been indicated by the expression ‘bar by verdict.’ The gist of that branch of the doctrine is that an actual decision on any matter directly in issue in a suit is conclusive of that issue in every subsequent suit brought on any cause and for any purpose or object. This distinction has been held to be of great practical importance, especially by American lawyers, and there is no doubt but that confusion has sometimes resulted from an inadvertence to it. It was explained clearly in the judgment of the United States Supreme Court in *Cromwell v. Sac*,²¹ in

Bar by judgment distinguished from bar by verdict.

²⁰ 1 Am Rep 425.

²¹ 94 U. S. 351.

delivering which Mr. Justice Field,—referring to the ‘difference’ between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action,—said: “In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is *strictly accurate when applied to the demand or claim in controversy*. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. *But where the second action between the same parties is upon a different claim or demand*, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the enquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.” Mr. Black observes “that the differences between the two cases are found chiefly in **two regards**, *viz.*, as regards the identity of the subject-matter in the successive suits, and as respects the scope of the estoppel

as to the matters determined by it." He even goes to the length of saying "that the two cases are distinguished by important changes in the rule; in so much that they suggest a clear line of cleavage for the logical division of the general subject, and a principle for the classification of the multitude of authorities."²²

The first case is certainly less extensive than the second, but the two do not appear to be separate and independant branches of the rule of *res judicata*. In fact, a consideration of the main condition of the first case that the former judgment must have been on the merits and on the same cause of action, shows that that case is actually comprised in the second case of the conclusiveness of judgment. A judgment is said to proceed upon the merits 'when the very cause of action is decided upon'²³ and Mr. Black himself says,²⁴ that a "judgment is upon the merits, when it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or state of facts disclosed by the pleadings and evidence and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions." It is clear therefore that a judgment in a suit will bar another suit only when the latter is based on the same point on which the former was based and which was decided in that former suit, and this is exactly the enunciation of the rule of bar by verdict or conclusiveness of judgment. This is further evident from "the fact that a judgment although not upon the merits, and therefore not conclusive in respect to the very cause of action, may still be final as to the precise point upon which the determination was based."²⁵

8. This defect in the Rule enacted by Sec. 2 was made up by the Courts continuing on general principles to act upon the rule of the conclusiveness of judgments as to issues also. Mr. Justice Mahmood pointed out in *Jamaitunnissa v. Lutfunnissa*,²⁶ that in "Sec. 2 the principle of *res judicata* was embodied only to a limited extent; but in interpreting the section, the Privy Council holding that, apart from legislative enactment, the principle of *res judicata* was an essential part of the law of procedure in every civilized country, applied that principle to the trial of issues as well as to the trial of suits." During almost the last days of the authority

²² Bl. Jnl

²³ Bl. Jnl. 30

²⁴ Bl. Jnl

²⁶ 1 L. R. VII. All. 61.

of that rule, Sir Richard Garth, C. J., in *Nobo Doorga Dasi v. Foyz Bux*,⁴⁷ after referring to the difficulty of the application of the law of estoppel to such cases, said: "Each year's rent is in itself a separate and entire cause of action, and if a suit be brought for a year's rent, a judgment obtained in that suit, whatever the defence might be, would seem only to extend to the subject-matter of the suit, and leave the landlord at liberty to bring another suit for the next year's rent, and the tenant at liberty to set up to that suit any defence she thought proper. But it is said, on the other hand, that in the former suit between the defendant and the plaintiff, the entire question of what ought to be the permanent abatement of rent, during the whole period of the lease, was substantially and necessarily tried and determined, and that they are neither of them at liberty to re-open the question. The principle upon which the abatement was made, the value of the land, the measurements, and other circumstances which form the materials upon which the Judge would estimate the amount of the abatement, would be applicable to one year as well as to another, and what was a just and proper abatement for the year 1871 would be an equally just and proper abatement in each succeeding year. There certainly appears to be great weight in this reasoning. The cases of *Mohima Chundra v. Asradha Dassia*,⁴⁸ and *Rakhal Dass v. Hira Motee Dasi*,⁴⁹ seem very much in point, and we think that we ought to act upon them. In one of these cases, the suit was brought by a landlord for one year's rent. The answer was, the land is rent-free, and a decision was passed against the landlord upon that ground. Another suit was afterwards brought by the landlord for another year's rent, and it was held that as between the parties it had been decided that the land was rent-free, and that this decision was binding upon them not only for the one year, but for all future years."

9. Other difficulties were experienced in the construction of the rule on account of the rather vague import of the expression 'cause of action', which may be pronounced to be the keystone of the rule of bar by judgment. The exact signification of the term for the purpose of the rule of *res judicata* was considered in several cases. Generally speaking, the term cause of
- in the application of the Statutory Rule on of the expres- of Action.

action means and includes every fact which it is material to be proved to entitle the plaintiff to succeed,³⁰ every fact stated as a cause of action in the plaint, every fact on which the plaintiff bases his title to the relief asked by him.³¹ Sir M. E. Smith, in delivering the decision of their Lordships of the Privy Council in *Soorjomonee Dayee v. Sudanand*,³² expressed it as their opinion that "the term cause of action is to be construed with reference rather to the substance than to the form of action." In *Krishna Behari Roy v. Brojeswari*,³³ he further expressed it as their Lordship's opinion that in Sec. 2 "the expression cause of action cannot be taken in its literal and most restricted sense." In *Chand Kaur v. Partap Singh*,³⁴ Lord Watson in delivering their Lordships' decision said, "The cause of action has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour." In *Naro Hari v. Anpurnabai*,³⁵ Mr. Justice West in delivering the judgment of the Bombay High Court said with reference to that expression of opinion, that their Lordships "would not allow a matter once disposed of, to be litigated again in a suit framed so as to differ formally from the previous one; and by substance they seem to mean the aggregate of circumstances on which the former suit proceeded or ought to have proceeded with reference to the relief sought to be obtained . . . His (plaintiff) cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference³⁶ . . . This is the principle involved in Lord Westbury's decision in the case of *Hunter v. Stewart*,³⁷ which has been adopted in recent decisions of this court, but without any conscious departure from the rule that matters naturally connected with each other so as to be proper for investigation together ought to be brought forward at the same time, and are to be considered as forming but a single Cause of Action."

³⁰ Cooke G.M., I. R. 8 C. P. 107.

³¹ *Chand Kaur v. Partap Singh* I. R. XV I. A. 156.

³² XII H. L. R. 315.

³³ L. R. II I. A. 287.

³⁴ I. R. XV I. A. 156.

³⁵ I. L. R. XI Bom. 166 (a).

³⁶ Quoted with approval in *Harsham II v. Mancharam* I. L. R. III Bom. 1.

³⁷ 4 De G. F. and J. 168.

It has been often laid down here as well as in other countries^e that a proper test of the identity of a cause of action is whether the same evidence would sustain both actions, as "two causes of action are held to be the same, only when the same evidence will sustain both."^f

The character of the identity of cause of action, which is essential to the application of the plea of bar by judgment, has been often considered by the American Courts also. "The applicability of the plea," said the Texas Supreme Court in *Girardin v. Dean*,^g "depends upon the identity of the cause of action or matter of defence in issue, and not the identity or similarity of the points or grounds urged to support or maintain the action or matter of defence; the reasons, the theories, the arguments by which the contention may be supported being irrelevant and not to be taken into account." For the identity of the cause of action, it is not necessary that both the suits are related to the same subject matter.^h Nor is it sufficient that the transactions involved in and giving rise to the two suits are the same; or that the same facts are used in the second suit as were used in the first, for it might be that such facts constituted but one severable part of the plaintiff's whole demand.ⁱ Nor *à fortiori* is it sufficient that the two cases should have grown out of the same transaction or state of facts so as to require the same evidence to be produced in the second suit; for the objects and causes of action relating to the fact might be successive or otherwise different. The cause of action may be different even when the relief asked is the same,^j and it has been held by their Lordships of the Privy Council in *Shankar v. Dyashañkar*,^k that for the identity of the cause of action it is not necessary that the relief asked in the two suits should be the same.

10. Sec. 2 was therefore very considerably modified on the enactment of the Civil Procedure Code of 1877; the rule of the bar by judgment having been replaced by that of conclusiveness of judgment, and the reference to

^e Thus it was said by the California Supreme Court in *Tapley v. Tapley*, 10 Cal. 221, that "the identity of two causes of action is said to be the same when the same evidence will sustain both, or rather the evidence necessary to sustain a judgment in the first action would have authorized a judgment for the plaintiff in the present action."

^f *Hutchins v. Campbell*, 2 W. B. 17; *McCarty v. Kennedy*, 2 Bos. an. 107; *Stewart v. Dooley*, 10

L. R. 1X

^g *Amphurata*, 1 L. R. XI. 100.
Bay v. H.

^h *Johnson v. McManis*, 52 Ind. 139.
ⁱ *Kelly v. Hope*, 77 N. Y. 420.
^j *Graham v. Morris*, 30 Fed. Rep. 652.
^k L. R. XV. 1 A. 66.

the identity of the cause of action replaced by that of the matter in issue, which as indicated above is the first essential of the rule of *res judicata*.^d The rule was thus enacted as Sec. 13 in the following form:—

“No Court shall try any suit or issue in which the matter, directly and substantially in issue, has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title.

Explanation I.—The matter above referred to must, in the former suit, have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section, when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.”

^d Mr. Freeman, referring to the identities of subject-matter, of cause of action, and of purpose or object, says, “While a concurrence of these identities usually attends when one case is determined by the decision in another, yet nothing is indispensable to impart a conclusive effect to a former judgment, as will be manifest by reference to a few of the reported cases except identity of issue or issues involved.”

11. Sir Whitley Stokes, who for a long time as Secretary in the Legislative Department to the Government of India, and later as the Legal Member of the said Government, took an important part in drafting the section, in speaking of its genesis, has said, "The principal clause and first Explanation are founded on the definition in Livingstone's Code of Evidence for the State of Louisiana, Sec. 192. *Res judicata* is whatever has been finally decided by a Court of competent jurisdiction—proceeding according to the forms of law—by a valid sentence on a matter alleged, and either denied or expressly or impliedly confessed by the other; and it is conclusive evidence of that which it decides, between the same parties or those that represent them, litigating for the same thing, under the same title and in the same quality. The second, third, fourth and fifth Explanations rest on decisions of English or Indian Courts. The sixth is taken from Livingstone's Code just mentioned, Sec. 198, and should be transferred to the Evidence Act."

12. The chief alteration made by Sec. 13 is the statutory recognition of the principle of bar by verdict. The Select Committee in their Report presented with Bill IV of the Civil Procedure Code of 1877, said that they had "amended the section by extending it so as to provide for estoppels against defendants," and that was done apparently by introducing the word 'issue.' Other alterations in the language necessitated by that addition, were not made, but the rule, even as it stands, is quite clear and unambiguous; and Latham, J., observed in *Rung Rav v. Sidhi Mahomed*,¹⁵ that "under the words of Sec. 13 'suit or issue,' the answer is admissible to estop a defendant from defence as well as a plaintiff from attack." In *Jamaitunnisa v. Lutfunnissa*,¹⁶ Mr. Justice Mahmood, speaking of the Section said, "It deals with two matters: first, the trial of suits, and secondly, the trial of issues. It is founded on a long course of judicial decisions, and especially on the dicta of the Privy Council, and has formulated in express terms the rule, which previously was only expressed in part by legislative enactment, that the principle of *res judicata* applies both to the trial of suits and to the trial of issues. The distinction between the two things appears to me to be clear. A suit ends in a dismissal or a decree, in whole or in part. An issue ends in a

¹⁵ I. L. R. VI Bom 484.| ¹⁶ I. L. R. VII All 615.

finding, and the rule contained in Sec. 13 goes the length of saying that not only is a suit which has once been tried and determined not again maintainable, but an issue which has once been directly and substantially raised and decided, shall not be litigated a second time. The reason of the maxim, *Nemo debet bis vexari pro eadem causa* seems to me to apply as much to the trial of issues as to the trial of suits, for in either case the harassment to litigants would be similar if matters could be reagitated after having been once duly adjudicated upon.’

13. While this provision as to a bar by verdict has met with general approval, its extension by Explanation II to the cases of mere constructive verdict has been often condemned as unsuitable to this country; but this is due, to some extent, to its being forgotten that the said Explanation has not introduced any novel principle, and is, in fact, in accordance with the rule as recognized and acted upon in England and the United States. The Explanation has often

Thus Sir Richard Garth, C.J., speaking of a suit on a certain title being barred by a suit on another title, in *Denobundhoo v. Kristomoni* ⁴⁷, said—“I don’t believe that the Legislature of this country, nor the Lords of the Privy Council, in interpreting the language of the Legislature, ever intended to impose upon a people, who are for the most part uneducated and imperfectly advised, a more stringent rule upon this difficult subject than has obtained for centuries past in civilized Europe.” In *Babu Lal v. Isher Prasad* ⁴⁸, Sir Robert Stuart, C.J., expressed his sympathy with that view, and said—“I have in several cases in this court taken occasion to express my regret that the law on this subject as recognized by English Courts should have been so inconsiderately imported, as I conceive it has been, into the practice of the Courts of this country, where there are few, if any, of the safe-guards which render this plea a reasonable one in a European Court; and there are even judgments of the Privy Council in appeal from the High Courts of India which carry the principle of this plea so far, that I would hesitate to apply the doctrine they lay down although approved by so august a tribunal unless the facts were precisely the same. It should be remembered that there is not here that *copia peritorum*, that resource of skilled appliance afforded by the presence of a thoroughly trained and experienced bar that there is in England (or rather I should say in Great Britain and Ireland, for the legal practice on this subject is the same in all parts of the United Kingdom), and that to introduce into the practice of the District Courts of India a legal principle, which, especially as recently developed and expounded, is the result of a high degree of legal refinement, is not considerate towards suitors who form part of such a population as we have to deal with. It is not tantamount to a denial of justice to them. These poor people avail themselves of the best professional assistance they can get in the *zila*, within which their villages are situated, but that is often poor indeed, if it is not generally unreliable, and to refuse relief to a plaintiff who makes an apparently just claim simply because his ignorant district pleader had omitted a particular plea in a previous suit is surely a proceeding of doubtful wisdom.” In *Muhammad Ismail v. Chatter Singh* ⁴⁹, Sir Robert Stuart, C.J., again said—“I must repeat the opinion, which I have so often expressed from the Bench in other cases, that this plea of *res judicata* is utterly unsuited to the great mass of litigation of this country; and that in shutting the mouth of a plaintiff or defendant because in a former suit between the same parties, or parties in the same right, the matter of the plea might therein have been urged and adjudicated upon, but was inadvertently omitted from consideration by it may be a poor litigant in ignorance of his rights, or by his local pleader not less ignorant of his law, or by a Court not very intelligent as to either, the policy of this law is mistaken, and I am convinced often leads to gross injustice.

⁴⁷ I. L. R., II Cal., 172.

⁴⁸ I. L. R., II All., 556.

⁴⁹ I. L. R., IV All., 69.

been justified on principles of expediency and public policy. Thus Mr. Herman says: "The plea of *res judicata* applies to every point which properly belonged to the subject in litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it. . . . A judgment decides every matter which pertains to the cause of action or the defence set up, or which is involved in the measure of relief to which the cause of action or defence entitles the party, even though such matter may not be set forth in the pleadings, so as to admit proof and call for an actual decision upon it. The reason in favour of this extent of the rule are found in the expediency and propriety of silencing the contentions of parties, and of accomplishing the ends of justice by a single and speedy decision of all their rights. It is evidently proper to prescribe some period to controversies of this sort; and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims? This rule is founded on sound principle. Suitors are bound to prepare and present their cases in a proper manner; they cannot be allowed to allege their own carelessness or ignorance as a ground for being relieved from its consequences." A defendant cannot escape from the consequences of an adverse judgment on the ground that he had a good defence in fact, and relied inconsiderately on an untenable point of law, and a plaintiff is precluded from repairing his mistakes or omissions by recourse to another action, unless under rare and peculiar circumstances."⁵¹ In *Ewing v. McNairy*,⁵² the Supreme Court of Ohio said:—"By refusing to relieve parties from the consequences of their own neglect, it seeks to make them vigilant and watchful. On any other principle, there would be no end to an action, and there would be an end to all vigilance and care in its preparation and trial." This was cited with approval in *Covington Bridge Co. v. Sargent*,^{52a} in which Ashburner, J., further said:—"The rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive; it might tend to unsettle all the determinations of law and open a door for infinite vexation."

Mr. Freeman explains the rule still more clearly and says, "the general expression, found in the Reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. What is really meant by this

⁵⁰ *Dewey v. Peck*, 35 Iowa, 242.
⁵¹ *Herm. Comm.* 131, 133.

| ⁵² 20 Ohio, 322
^{52a} 37 Ohio 247

expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counter-claims, cross-bills, and equitable defences, or either of the parties may have acquired new rights pending the litigation, which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But as long as these several matters are not tendered as issues in the action, they are not affected by it. Whatever material allegations the plaintiff makes in his pleadings he must maintain, if they are controverted, and failing to do so, a judgment against him is conclusive of their falsity. The defendant, on his part, must controvert all these allegations which he wishes to gainsay, and failing to do so, their truth is incontestably established as against him. He cannot by failing to deny any of them, or if he denies them, by failing to offer evidence to controvert that offered by plaintiff in support of any of them, successfully claim that it has not been litigated and determined against him. In other words, neither party can decline to meet an issue tendered by the other, and then maintain that it has not become *res judicata*. The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defences which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed. In this sense is it true that a judgment is conclusive of every matter which might have been litigated and decided in the action. But the plaintiff is under no obligation to tender issues not necessary to support his cause of action, nor is the defendant required to meet issues not tendered by plaintiff; and if, after the defendant has fully met all the issues tendered by plaintiff, there is any matter not admissible in evidence under the pleadings, it is generally not concluded by the judgment, though the parties might by different pleadings have made it an issue in the action and had it determined."⁵⁵

Field, J., in delivering the judgment of the Court in *Cromwell v. Sac*,⁵⁶ said: "On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations,

⁵⁵ 17 F. 2d 441. | ⁵⁶ 94 U. S. 351.

other than the actual merits, may govern a party in bringing forward grounds of recovery or defence, in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. . . . The language of the Vice-Chancellor in the case of *Henderson v. Henderson*⁵⁶ is sometimes cited as expressing a different opinion, but upon examining the facts of that case, it will appear that the language used in no respect conflicts with the doctrine we have stated. . . . There is nothing in this language applied to the facts of the case, which gives support to the doctrine that whenever in one action a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is in a subsequent suit between the same parties upon a different cause of action precluded from availing himself of such ground." There is nothing in these remarks to indicate that a decision in any matter that not only might, but ought to have been urged in a former suit will not be *res judicata* in regard to that matter in a subsequent suit. The rule as extended by Explanation II. does not go beyond the above statement of it, and expressly enacts that it is only the matter that *ought* to have been made a ground of attack or defence in the former suit that shall be deemed to have been in issue in that suit.

14. Another material alteration made by Sec. 13 was the express extension of the doctrine of *res judicata* with certain limitations to Foreign judgments, the limitations being enacted by Sec. 14 which in the Civil Procedure Code of 1882 stands as follows :—

The extension of the rule to Foreign judgments.

"No foreign judgment shall operate as a bar to a suit in British India—

- (a) if it has not been given on the merits of the case :
- (b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India :
- (c) if it is in the opinion of the Court before which it is produced contrary to natural justice :

(d) if it has been obtained by fraud :

(e) if it sustains a claim founded on a breach of any law in force in British India.

The operation of the rule has since been restricted to only a few Courts by a proviso added to the section by Act VII of 1888, providing that “where a suit is instituted in British India on the judgment of any Foreign Court in Asia or Africa, except a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a Supreme Consular Court established by an order of Her Majesty in Council, the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed.” The extension of the doctrine of *res judicata*, which in strict law applies only to domestic Courts, is from motives of comity and policy recognised, with some limitations, in almost every civilized country; and had been long before the Code of 1877, accepted and acted upon by the Courts in British India.

15. In the rule of *res judicata* as enacted in 1877, only two alterations have since been made, and they are to a great extent of a verbal character. The Select Committee in their Report presented with the Bill, finally enacted as the Civil Procedure Code of 1877 observed, that they had provided “that in the former suit the matter in issue must have been not only substantially but directly in issue.” Grammatically, however, the words ‘directly’ and ‘substantially’ could not be read with the ‘matter in issue’ in the former suit. The Legislature, following up their own intention, inserted the word ‘directly’ in Explanation II to qualify that expression in regard to the former suit. By Act XII of 1879, both the words were introduced into the body of the section itself so as to refer to the former suit, the Select Committee observing in their report that they had amended the section, “so as to make it clear that the Court may not try any suit in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit, was heard and finally decided therein; but that a decision on a matter collaterally in question or incidentally cognizable is not binding on any Court other than that which pronounced it.”

16. The other alteration was made with a view to render it clear that the competency of jurisdiction required for the rule of *res judicata* in regard to the Court trying the former suit was as to the subsequent suit also. This was held to be the law under the Codes of 1859 and

The leading case in favour of that view is *Edun v. B* in which case Sir Barnes Peacock, C. J., treated the concurrence of jurisdiction as an essential part of the rule of *res judicata*, as an essential condition of the application of that rule. That decision was approved of and followed in some cases, and has since the enactment of the Code of 1882, been expressly approved of by their Lordships of the Privy Council in *Raghobar Dial v. Singh*,⁵⁷ and in *Run Bahadur Singh v. Luchoo*

In the former case it was held that a decision by an Assistant Commissioner as to the existence of the consideration for a bond, in a previous suit for some interest due on the bond, did not constitute *res judicata* in a subsequent suit for the amount of the bond, which was beyond the Assistant Commissioner's jurisdiction. Sir Richard Couch in delivering their Lordships' decision said :—" If the decision of the Assistant Commissioner is conclusive, he will, although he could not have tried the question in a suit on the bond, have bound the plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think this was not intended, and that by Court of competent jurisdiction Act X of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction." In the latter case, Sir R. P. Collier in delivering their Lordships' decision said,—“ If this construction of the law were not adopted, the Lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire.” Yet, on account of the language employed in the section, the contrary had been held in some cases, among which mention may be made of the case of *Toponidhee Dhirj Gir v. Sreeputty Sahaneepetty*,⁵⁸ in which White, J., concurred in the decision, with the observation that he personally shared in the views of Sir Barnes Peacock, and if unfettered by authority would have held that the competency required was in respect of the subsequent suit

also. On account of this construction, difficulty was first experienced chiefly in rent suits, and the Courts tried to avoid it by holding that the question of title to the property in respect of which rent was claimed would not be directly in issue in the suit. This was of course not correct, and in 1879 a Select Committee of the Indian Legislative Council, to remove the difficulty, proposed to add an "explanation declaring in effect that a decision in a suit for arrears of rent under any local law relating to landlord and tenant, shall not be deemed to be *res judicata* in case of suits relating to the title to the property in respect of which the rent is claimed." But on account of the alteration in the section referred to in the preceding para. the explanation was struck off the final amending Bill, the Select Committee observing that "it would not apparently have suited any part of British India but the Lower Provinces." and that "there the Local Legislature will be able, if it thinks fit, to declare that a Court trying a suit under a rent law, shall not be deemed by any Court trying a suit under any other law, as regards the title to the immovable property in respect of which the suit is brought, a Court of competent jurisdiction within the meaning of this section." Even in 1882, it was proposed to provide in the Presidency Small Cause Courts Act, that "notwithstanding anything contained in Sec. 13, no decision passed under the provisions of that Act, shall, in any Court other than the Small Cause Court, be conclusive as to anything except the right at the time of such decision to the relief granted thereby, or the absence of a right at such time to any relief claimed by the plaintiff and withheld by such decision." The proposal was dropped, however, on account of the addition in Sec. 13 of the words "competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

17. As thus amended, the section was re-enacted in the Civil Procedure Code of 1882 in the following form, which it has since retained, and in which it now stands on the Indian

Statute Book :—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction com-

petent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V. Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction."

As thus enacted, the rule did not introduce any new law, but only put "into the form of a Code that which was the state of the law at the time."⁶⁰ In *Mahomed Salim v. Nabian Bibi*,⁶¹ Mr. Justice Mahmood, after referring to the rule as enunciated in the *Duchess of Kingston's case*, said "it has never been materially altered, and I look upon Sec. 13 of our own Civil Procedure Code as a reproduction of the old rule of law."

18. The section even in its present form is not complete or exhaustive of the effect of *res judicata*.^{62 f}

Incomplete character of the present rule. “It does not deal with the case of judgments *in rem*, nor with that of parties represented by, though not claiming under the parties to the former suit.”⁶³ In *Sitaram v. Amir Begam*,⁶⁴ Mr. Justice Mahmood, after observing that the section had been “carefully framed, and has given legislative expression to one of those rules of law which are most difficult to formulate for purposes of codification,” said that “in interpreting the language of that section, we cannot ignore the fundamental principles of the rule to which that section gives expression, unless, indeed, the express words of the Statute clearly contradict those principles.” Mr. Justice West said, in *Bholabhai v. Adesang*,⁶⁵ that Sec. 13 could not be applied quite literally; as if it could, the Court trying a second suit would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant for that case, though not formally set aside.⁶⁶ In *Balkishan v. Kishanlal*,⁶⁷ Mr. Justice Mahmood observed that “Sec. 13 aims at enunciating the whole rule, and the aim has been substantially achieved, though my judgment in the case of *Sitaram v. Amir Begam*, and the judgment of West, J., in *Bholabhai v. Adesang*, and the judgment of Melvill, J., in *Nilvaru v. Nilvaru*,⁶⁸ indicate illustrations of the difficulties which the wording of the section still leaves open to doubt.”

19. The bar to a fresh trial or decision on account of the principle of *res judicata* is absolute, and as against all the parties to the suit in which that decision was passed. In *Gan Savant v. Narayan Dhond*,⁶⁹ West, J., said, “It follows from the leading principle of *res judicata* that the same

^f Even while the amendment as to the concurrence of jurisdiction was under consideration by the Legislative Council in 1882, the Honourable Mr. Evans in introducing it in the Legislative Council on the 6th March 1882, said that, “It had been suggested to him that the section as amended did not compel a Court which had no jurisdiction finally to decide certain questions, to follow the decision of Courts which had exclusive jurisdiction to decide such matters. But he thought it did not require any section in a Procedure Code to secure the result. The rules laid down in the *Duchess of Kingston's case* and declared by the Privy Council applicable to India covered the whole ground. The section as amended would be useful and salutary, if not exhaustive.”

^g Even Sir Whitley Stokes admits⁷⁰ that the question of *res judicata* “is a subject of which the importance in a country inhabited by a litigious population is only equalled by the difficulty of dealing with it clearly and correctly in a legislative enactment.”

Bhambal v. Bhambal, I L R, XII All 375; *Madayach v. Vithalrao*, I L R, XV Mad 119; *Ahmedoy v. Vaidyoboy*, I L R, VI Bom 110.

⁶² I L R VIII All 334

⁶³ I L R IX Bom 51

⁶⁴ *Sitaram v. Amir Begam*, I L R VI Bom 110.

⁶⁵ I L R, XI All 133

⁶⁶ I L R VI Bom 110

⁶⁷ I L R, VII.

⁷⁰ II, Ang

matter shall not be agitated again on the original ground so as to imperil the stability of the decision formerly given. 'Where there is *res judicata* the original cause of action is gone, and can only be restored by getting rid of the *res judicata*.' ⁷¹ The existence of a decree in a plaintiff's favor may seem not to be a good reason for depriving him of a right to sue, and under the Roman law the plea of *res judicata* could be met by a replication of *res secundum se judicata*.⁷² Under the English law also a judgment, it is said, is a bar only when it has negatived the right⁷³—but this holds generally only when the cause of action in the second suit has arisen on the same original right at a different time from the first, or the first action went off on a mere technical defect. Under the Anglo-Indian law it has long been recognized that a decree-holder must obtain satisfaction of his decree by execution, not by another suit.⁷⁴ A new suit cannot be brought either on the original cause of action, or, save in special cases, on the decree in which that cause has become merged. The object of the Legislature has been to prevent continued litigation on the same grounds, and this would obviously be defeated by allowing a decree-holder to abstain from putting his decree in force, and proceed again on the same cause as before."

As a general rule, the operation of the doctrine and the bar by the judgment must be mutual also. In *Surrendernath v. Brojonath*,⁷⁵ Sir William Comer Petheram, C. J., observed that the test of *res judicata* was mutuality. In *Gnanambal v. Parvathi*,⁷⁶ Mr. Justice Muttusami Ayyar, observed that there could be no estoppel without mutuality. What is meant by an estoppel being mutual is, that the particular judgment is binding upon both, if obligatory upon either.⁷⁷ Both the parties must be alike estopped by it, or it cannot be set up as conclusive against either. A party will not be concluded against his contention by a former judgment unless he could have used it as a protection had the judgment been the other way; and conversely, no person can claim the benefit of a judgment as an estoppel upon his adversary, unless he would have been prejudiced by a contrary decision of the case.⁷⁸ In *Jamaitunnisa v. Lutfunnisa*,⁷⁹ Mr. Justice Mahmood, said "a finding which conclusively binds one party must necessarily bind

⁷¹ *Lacky v. Ferryman* 1 L. R. 2 Ap. (n. 539, 1) Per Lord

Poyar v. Minora, 7 Q. B. D. 339; per L. J.

Kuan v. Anandram N. B. H. C. R.,

Fakirappa v. Pandurangappa, 1 L. R. VI. Bom.

1 L. R., XIII. Cal. 356

1 L. R., XV. Mad. 477.

Herm. Comm. 242.

Bl. Jud. 632.

1 L. R., VII. All. 619.

the opposite party also, and that, but for this reciprocity, the rule of *res judicata*, far from attaining its object of putting an end to litigation, would only achieve the contrary result of increasing litigation."

20. There is a conflict, however, as to whether the doctrine of *res judicata* applies only to a trial by a Court of original jurisdiction, or even to a disposal by an Appellate Court. A trial has, in a general way, been defined to be the formal method of examining and adjudicating on the matter in dispute between a plaintiff and a defendant in a Court of Law, but Sec. 13 does not throw any light as to the exact sense in which the trial is barred by that section. The Calcutta High Court has held in *Abdul Majid v. Jew Narain*⁸⁰ that a trial by an Original Court only is contemplated, and that the Section has no application to the disposal of an appeal; and that when there is no *res judicata* at the time of the trial of the original suit, the Appellate Court is bound to decide the appeal on the merits. In that case, A. sued J. for an account in regard to his share in a certain *ticca* transaction in which he claimed to be a partner, and J. sued A. for rent on the ground that A. was liable for it as a tenant of a portion of the *ticca* property. Both the suits were heard at the same time, the evidence taken in one suit being considered as evidence taken in the other. Both were decided against A. who did not appeal against the decree for rent, but appealed against the decree dismissing the suit for account, and it was held that the decision that was not appealed against could not operate as *res judicata* so as to bar the disposal of the appeal that was presented. The contrary was held, however, by a Full Bench of Allahabad High Court in *Batkishan v. Kishanlal*,⁸¹ in which a decision of the High Court in a suit for rent for 1292 F. was held to be *res judicata* in a second appeal, presented prior to that decision, in a suit for rent for 1293 F. Mr. Justice Mahmood (with whom Sir John Edge, C. J., and Straight, J., concurred) said that, "the doctrine, so far as it relates to prohibiting the retrial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the judge is called upon to decide the issue. The rule contained in Sec. 13 is not limited to the Courts of first instance, it applies equally to the procedure of the first and second Appellate Courts by reason of Secs. 582 and 587

⁸⁰ 1 L. R., XVI. Cal. 253.

⁸¹ 1 L. R., XI. All. 148.

(Civil Procedure Code), respectively, and, indeed, even to miscellaneous proceedings by reason of Sec. 647.” The Punjab Chief Court also held the same in *Nur Muhammad v. Jamun*,⁸² in which case the plaintiffs had first sued for a declaration as to the invalidity of a gift of certain property, and while an enquiry was being held into it on remand, the donor died and the plaintiffs brought another suit for possession of the same property, and the appeals in both the suits were disposed of by the Lower Appellate Court on the same day. The decision in the declaration suit had not been appealed from, and was therefore held to have become final and to constitute *res judicata* in the suit for possession in which an appeal was presented to the Chief Court.

21. There is no doubt that the word “suit” in the rule of *res judicata* is to be taken in rather an extensive sense. Thus a decision as to two bonds in a suit was held by a Full Bench of Allahabad High Court in *Sheoraj v. Kashinath*⁸³ to be *res judicata* as regards those two bonds in a subsequent suit in respect of those and other bonds. Mahmood, J., said, in his decision in the case,—“If the word ‘suit’ were taken literally, it might with some plausibility be contended that there is no *res judicata* in respect of any of the bonds. The word ‘suit,’ as it occurs in Sec. 13, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as Sec. 45. Adopting this interpretation, it is clear that the two bonds which were the subject of the former suit cannot be allowed to form the subject of litigation again; and the circumstance that the plaintiff has joined them in the present litigation will not enable him to obviate the plea of *res judicata*.” Proceedings in execution of a decree are a part of the ‘suit’ in which the decree is passed. This was the view taken by their Lordships of the Privy Council in *Abidunnissa v. Amirunnisa*,⁸⁴ though the decision in that case turned on another point. In *Rupkauri v. Ramkirpal*,⁸⁵ Pearson, J., (with whom Straight, J., concurred) incidentally observed, that “proceedings in execution of decrees are included in the category of ‘Miscellaneous’ which are expressly distinguished from suits and appeals in Sec. 647 (Civil Procedure Code). . . . It was suggested that under the provisions of

⁸² 1890 C. R. N. 151.
⁸³ 1 L. R. VII. All. 32.

| ⁸⁴ L. R. IV. 1 A. 66.
⁸⁵ 1 L. R. III. All. 143.

that section, the law of *res judicata* contained in Sec. 13 would apply to proceedings in execution of decree; but I cannot hold the law of *res judicata* to be procedure." The final decision in the case was reversed on appeal; and as against it, Melvill, J., in delivering the judgment of the Bombay High Court in *Manju Nath v. Venkatesh Gorind*⁸⁶ said; "We are not sure that we should feel constrained to put upon the word 'suit' in Sec. 13 the narrow construction adopted by the Allahabad High Court. Sec. 2 of the Act, as amended by Act XII of 1879, declares that an order under Sec. 244 is a decree; and the term 'decree' is defined to mean 'the formal adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal.' From this it might very fairly be argued that every proceeding which terminates in a decree (and a proceeding in execution is such a proceeding) is a suit within the meaning and intention of the Code. In the case of *Bhikam Bhat v. Joseph Fernandez*,⁸⁷ we have pointed out that there may be a distinction between the term 'suit' as used in the Civil Procedure Code, and the term 'regular suit' as used in the Limitation and other Acts; and we referred to the decision of the Calcutta High Court in *Emam Momtazuddin Mahomed v. Raj Koomar Das*,⁸⁸ in which it will be observed that the Full Bench of that Court in dealing with the question of *res judicata* refused to adopt the narrow construction which one learned judge wished to attach to the word 'suit' in Sec. 2 of Act VIII of 1859." The decision in *Dinkar Ballal v. Hari Shridhar*⁸⁹ is really not against that view. Mr. Justice Scott's opinion in that case was based on altogether a different ground; and Mr. Justice Jardine, after pointing out that "the subject-matter then in litigation was a different piece of land which the present deed of sale purported to convey to plaintiff along with the piece of land now in litigation," said "If that decision had been a final decision in a suit as distinguished from this execution proceeding, it would have created estoppel by *res judicata*. . . . The powers of the Court in execution are, under Sec. 244, concerned with questions relating to the execution, discharge or satisfaction of the decree: that to Application No. 48 of 1885 no provision for appeal existed: that the only property about which the order is passed, is the property attached in execution. Thus the determination of the validity of the deed was

I L. R. VI Bom. 61
I L. R. V Bom. 673

86 XIV B. L. R., 406.
87 I. L. R. XIV Bom. 29

only important with regard to that property ; and any inference to be drawn from the finding as to the ownership of other property not then in suit and perhaps not in dispute was merely incidental.⁹⁰ I do not think the provisions about claims to attached property were intended to apply to dealing with the titles to other lands not in suit. If the effect of *res judicata* were to be given to the orders incidentally affecting such titles, the confusion so arising might do more harm than good, and defeat both the reasons for the rule. . . . It would be absurd to allow by express words fresh litigation about the property formally adjudicated in the execution matter, and by a jural rule to prohibit any direct trial of the right to the other property about which there has been no formal litigation, perhaps no dispute. This consideration is still more important, as in many cases, before formal suit is brought and the other property valued, it is impossible to know whether the Court executing the decree is competent to adjudicate on the other property.”

Proceedings under the Insolvency Sections of the Punjab Laws Act were held not to be a suit in *Chiranji Mal*,⁹¹ in which Powell, J., in delivering the judgment of a Division Bench said :—“The term suit is not defined by law ; at the same time it is clear from Sec. 647 of the Code that the law does not necessarily consider every proceeding in which there are parties, evidence, argument and decision, to be a suit. There are clearly proceedings in a Court of Civil Jurisdiction other than suits and appeals. A suit is understood to be a ‘remedial instrument of justice,’ whereby the plaintiff seeks to recover a right or to enforce a claim ; and a proceeding by which a debtor escapes pursuit for debts which he cannot meet, or a creditor puts the debtor under the action of the Court for the administration of his assets, is more naturally described as a proceeding in a Court of Civil Jurisdiction than as a suit. . . . That section merely desires that the same procedure as is by law provided for suits shall, as far as possible, be followed in other Civil proceedings ; it does not authorize us to adopt the wording of sections on the *mutatis mutandis* principle.” Criminal proceedings cannot be considered a *suit*, and a decision therein cannot bar the trial of any suit or issue by any Civil Court.⁹² Nor would an order under Act XXVII.

⁹⁰ *Ran Bahadur Singh v. Lachoo Koor* L. R. XII. 1 A. 38.
⁹¹ 1894 P. R., No. 145.

Moham Hussain v. Mahomed Khan, 1877 P. R., No. 56.
Lal v. Tula Ram, I. L. R. IV All. 97.

of 1860 bar a suit by the unsuccessful party for contesting the validity of a will on the basis whereof that order was passed,⁹³ the prayer in the plaint to set aside the certificate being treated as immaterial.

Miscellaneous Civil proceedings will be a *suit*, however, when they are treated as a *suit* by the Legislature. An application under Sec. 63 of Act II of 1874 will thus be barred by a previous application by the same person in the same matter under the same section or the corresponding section of a prior Act, on the ground that, though the proceedings are of a miscellaneous character, yet being referred to as a *suit* in that section, must be treated as such for the purposes of the rule of *res judicata*.⁹⁴ A decision under Sec. 8 of Act XIX of 1863 by a Collector in certain partition proceedings is a decision in a suit.⁹⁵

22. As to the exact signification of the word issue, of which the trial will be barred by the application of the rule of *res judicata*, it is provided by the Civil Procedure Code⁹⁶ that "an issue arises when a proposition of law or fact which a plaintiff must allege in order to show a right to sue is affirmed by the one party and denied by the other." The issue may therefore be one of law exclusively, or in regard to any fact, with regard to the status of an individual or to the right to any property, or to the question of a descent or pedigree.⁹⁷ The conclusive effect of a decision is the same whether it is rendered upon a technical rule of law or on evidence, and whether the question involved "be the interpretation of a private contract, or the legality of an individual act, or the validity of a Legislative enactment."⁹⁸ Whenever the construction of an instrument has been judicially determined, it must be followed in every other suit where the same issue arises between the same parties or between those in privity with them.⁹⁹ Thus where the matter decided is the right under the language of a certain contract to take receipts on a railroad, the judgment concludes the question of the meaning of the contract in a suit

⁹³ Anand Mohan v. Indro Monoy, XVI W. R. 214.

⁹⁴ Eliza Smith v. Secretary of State for India, I. L. R., III Cal. 340, Garth, C. J., and Markes J., affirming the decision of Kennedy, J. Harra Lal v. Maharaj Singh, I. L. R., II All. 29, 14.

⁹⁷ Davies v. Mayor, 93 N. Y. 250.

⁹⁸ Herm. Comm. 100.

v. Clyde, 19

v. Grawey, 31 Ala. 575.

Stewart v.

Thorn v. Newson, 53 Am. Rep. 747.

for subsequent bills received under the same contract.¹⁰⁰ Speaking of the bar by a prior determination of an issue, Dr. Bigelow says, without any qualification, that the conclusiveness includes "of course as well the law as the facts involved in the case."¹ A finding on an issue of law involved in a former suit operates as *res judicata* like a finding on an issue of fact;² "otherwise," says Dr. Bigelow,³ "the doctrine of *res judicata* would in many cases be a mere delusion.

In *Lorillard v. Clyde*,⁴ a finding in a prior suit as to the divisibility of a bond obligation payable by instalments was held by the New York Supreme Court to be *res judicata* in a subsequent suit for the last instalment of the bond; Vann, J., in the judgment of the court, saying:—"Its unity or divisibility was directly at issue in the action pleaded as a bar, and every material question of fact or law involved in an issue must be regarded as determined by the final judgment in the action, so as not to be the subject of judicial investigation again in any subsequent litigation between the same parties." In *Cauhape v. Parke*,⁵ the same court held that a judgment on the construction of bye-laws would be conclusive in a subsequent suit.

The same view has been taken by the High Courts in India. Thus in *Muhammad Rustam Ali Khan v. Muhammad Azamat Ali Khan*⁶ a decision on a pure question of law relating to the Court's jurisdiction in the former suit was held by the Punjab Chief Court to have that effect in a subsequent suit for the same property. Barkley, J., in delivering the judgment of the Court, said:—"It is not denied that in the previous suit the Chief Court was competent to decide whether it had jurisdiction to entertain the present claim or not, and as a decree had been passed in favour of the plaintiffs, which the defendant attacked on the ground of want of jurisdiction in the Court, the question whether the Court then had jurisdiction or not clearly became a matter directly and substantially in issue between the parties, and the decision of that question has become final. This Court is therefore debarred by the express terms of Sec. 13 from trying the same question between the same parties in the present suit." Similarly, a Division

R. R. Co. v. R. R. Co., 20 Wall. 187

Milwaukee & Wis., 205

¹ 19 Am. St. Rep. 470.
² 43 Hun. (N. Y.), 308.
³ R. No. 64

Bench of the Allahabad High Court held in *Phundo v. Jangi Nath*⁷ that a finding as to the validity of an adoption in a former suit would forbid the re-opening of the same question in a subsequent suit between the parties, Tyrrell and Blair, J.J., observing “that the former decretal finding on the legal point, though ever so erroneous, would be binding on parties who did not get rid of it by appeal.”

It has even been held that a decision on a point of law will be *res judicata* though it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench of the High Court has subsequently disapproved. Thus in *Gowri Koer v. Audh Koer*,⁸ the decision in the former suit was based on the circumstance that a certain deed of sale as a matter of law conveyed nothing. In another case, a Full Bench decided against the principle on which that decision was based, and Sir Richard Garth, C. J., and Beverley, J., held in a subsequent suit between the parties relating to the same property, that the decision in the former suit was *res judicata*; Sir Richard Garth, C. J., observing that “it is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which this Court has subsequently disapproved.”

A somewhat different view appears to have been taken in *Parthasaradi v. Chinna Krishna*,⁹ in which Sir Charles Turner, C. J., and Muttusami Ayyar, J., said:—“The respondents rely on what is known as estoppel by verdict and not on estoppel by judgment. It is contended on their behalf that the matter in issue and determined in the former suit was this—that the respondents are not entitled to erect a temple or to assemble for public worship within the customary ambit of the *Tenkalai* processions. It must be admitted that this issue was raised and decided in the former suit, but it was raised not as a question of fact but as a question of law. . . . The contention of the appellants then substantially is this—that because a question of law was directly or substantially in issue and was erroneously decided by a competent tribunal, that decision is conclusive as between the parties to the proceedings in which it was pronounced, and its propriety cannot be questioned in any subsequent proceedings

between the same parties in which the question may again arise. Courts are bound to ascertain and apply the law and not to make law, and it is a suggestion repugnant to reason and to justice that, because a Court has erred in ascertaining the law, it is bound to repeat its error whenever the same question of law may arise between the same parties. Although considerations of convenience have established the rule that the final decree of a competent Court is decisive of the rights it declares or refuses notwithstanding it may have proceeded on an erroneous view of the law, and although the same considerations have established the rule that the determination by a competent Court of questions of fact directly and substantially in issue are binding on the parties, these considerations do not suggest the expediency of compelling the Courts to refuse to give effect to what they have ascertained to be the law. The term estoppel by verdict indicates that such estoppels are confined to questions of fact, and no authority has been cited to warrant the application of the rule to the determination of an issue of law." This decision was followed in *Venku v. Mahalinga*,¹⁰ in which Mutusami Ayyar, J., (with whom Parker, J. concurred) said—"As to the contention that if it is the source of a right to insist on partition, it must likewise be a valid ground of succession to a collateral relation, I may observe that it was held in *Parthasaradi v Chinna Krishna*, that the doctrine of *res judicata* does not necessitate a repetition of an error of law, if any, and preclude an enquiry into the soundness of the rule of decision which was adopted in a previous suit save as to the precise object-matter or immediate purpose of that suit." Dr. Bigelow also says¹¹ :—"The facts decided in the first suit cannot be disputed, and for the purpose of the conclusiveness of those facts, but no further, the law applied must be accepted.¹² Thus if a decree in a suit to declare a mortgage invalid proceed upon the constitutionality of a statute, the parties cannot afterwards deny the validity of the statute in question, when the mortgagee attempts to foreclose.¹³ It could hardly be true that they could not raise the question again in a suit upon a different subject-matter."¹⁴ This, however, falls far short of what the Madras High Court has decided as correct, and which is not supported by the decisions of any other High Court in India or by the practice of the Courts in England or America.

¹⁰ 1. L. R., XI Mad. 393

¹¹ Big. Estop. 100.

¹² *Bernard v. Hoboken*, 3 D. C. 417

¹³ *McDonald v. Mobile Ins. Co.*, 65 Ala. 558.

¹⁴ *Ibid.*, p.

CHAPTER II.

MATTERS IN ISSUE AND THEIR IDENTITY.

23. The first essential of the rule of *res judicata* is the identity of the matter in issue, or as The matter decided need not have been in issue in a *previous-ly* instituted suit. enacted by Sec. 13 of the Civil Procedure Code, the matter directly or substantially in issue in the subsequent suit or issue should have been similarly in issue in a *former* suit. Under Act VIII of 1859, the word *former* was held to refer to the priority in the institution of the suits. “The question whether the matter has been already heard and determined,” said the Madras High Court in *Venkatadri v. Narayya*,¹ “is to be decided with reference to the state of things existing at the time when the Court has the matter submitted for its cognizance.” The shifting of the bar, under the Code of 1877, from the cognizance to the trial, and the omission from Sec. 13 of the word ‘instituted’ used in Sec. 12, show that the question as to whether the suit in issue has been already heard and decided shall now have to be determined with reference to the state of things existing at the time of the trial. The word ‘former’ would thus by no means signify more than ‘another,’ and a decision in even a subsequently suit would bar the trial of a previously instituted one. This has actually been held by a Bench of three Judges of Allahabad High Court in *Balkishan v. Kishantal*,² in which Mahmood, J., said—³ “The doctrine, so far as it relates to prohibiting the retrial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a final judgment pronounced meanwhile in such previous litigation should operate as *res judicata* preventing the Judge dealing with the latter litigation from adjudicating differently. If this is not done, the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated.” This is the view held by the English and the American Courts also. Thus Mr. Herman, in his Commentaries on the law of *res judicata*, says—

¹ IX M. J. 20
² I. L. R., XI, 143.

³ 7 Ind. P. 162
 Allahabad Court

“a prior judgment upon the same cause of action sustains the plea of former recovery, although the judgment is in action commenced subsequently to the one in which it is pleaded. It is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff, in lieu thereof, one of a higher nature.”⁵ The contrary was held in *State v. Spikes*,⁶ but the weight of authority is clearly in favor of the view that a judgment in a suit will be binding in other suits whether commenced before or after that suit.⁷

24. It is necessary, however, that the decision must have been in another suit, as the doctrine of *res judicata* has no application to decisions in a former stage of the same suit, though an analogous principle applies in such cases, and having similar effect is sometimes spoken of as that of *res judicata*.⁸ In *Kishan Sahai v. Aladad Khan*⁹ Sir John Edge, C.J., and Tyrrell, J., in speaking of the binding effect against a person in execution proceedings of a decision in a suit to which he was a party, but in which he had not made a proper defence, said that it was a case which fell “within the principle of Explanation II Sec. 13.” So also in *Ramlal v. Chhabnath*,¹⁰ Sir John Edge, C. J., and Brodhurst, J., held that a finding on an appeal by a defendant would be *res judicata* in the disposal of a subsequent appeal against the same decision by the plaintiff, and expressly observed that the principle of *res judicata* applied to such a case, but admitted that Sec. 13 had no application to it. The distinction was clearly pointed out in *Ram Kirpal v. Rup Kuari*,¹¹ in which Sir Barnes Peacock in delivering the decision of their Lordships of the Privy Council, observed, that “the binding force in subsequent execution proceedings of a judgment as to a certain decree not having awarded mesne profits did not depend on Sec. 13, but upon general principles of law,” because “if it were not binding, there would be no end to litigation.”

⁵ *Bank of United States v. J*
7 Gill 415

⁶ 33 Ark 201

or *v. Mowry*, 93 Am Dec
v. v. Israel, 120 U. S. 506
see *Grayson*, 16 Am. St.

Bank v. J

v. Mitchell 48 Mo 45.

⁹ *V. v. Chhabnath v. Pydel*, I. L. R. XV Mad.
491

¹⁰ I L R XIV All 64

¹¹ I L R XII All 573.

¹² L R XI I A. 37

So also West, J., in *Budan v. Ramchandra*,¹² said—"If the question of the judgment-debtor's personal liability, or of the liability of his property generally to execution of the decree had really been determined by an adjudication in the course of the execution proceedings, that determination, so long as it stood unreversed, would, no doubt, be binding on the parties, whether the term *res judicata* properly applied to it or not."

25. The word 'matter' includes in its signification "the whole of the matter or matters," as under the General Clauses Act, 1868, the words in the singular number include the plural. It may, generally speaking, be said to be equivalent to a 'fact in issue,' which as defined in the Indian Evidence Act, denotes matter from which, either by itself or in connection with other matter, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit necessarily follows. The rule of *res judicata* as enacted in the Civil Procedure Code has, however, not used the expression 'fact in issue' but 'matter in issue,' and the difference cannot have been otherwise than intentional. The important question, however, is what is the matter in issue within the meaning of the rule,—and unfortunately there is a considerable conflict of authority on that point. The leading case in favor of a narrow construction of the expression appears to be that of *King v. Chase*,¹³ in which Chief Justice Parker said—"Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue in one sense. As, for instance, in an action of trespass if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. . . . Facts offered in evidence to establish the matters in issue are not themselves in issue within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue, even if their

A matter in issue distinguished from a matter of evidence.

authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matters put in issue by the plea of *nul disseisin* or not guilty which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The title is in issue. The deed comes in controversy directly in one sense; that is, in the course taken by the evidence it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary, of itself, to the finding of the issue. It may be made so by the parties. This may be illustrated by the case before us the former action was for taking certain oats. The matter in issue was the title to the oats, and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title The conversion by the defendant in that case was not denied if the plaintiff had title. That matter is settled. The verdict and judgment may be given in evidence in another action for the oats between those parties, and is conclusive; but that is the extent of what was in issue. It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue, and the only matter in issue. But this was only a controversy about a particular matter of evidence upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring another suit for those oats against the same defendant, and relying upon some other title than that mortgage, try the title to the oats over again. Can he do so? Clearly not; and the reason is that it is his title which has been tried, and he is concluded The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title; but the mortgage was not in issue."¹⁴ This was re-affirmed in *Vaughan v. Morrison*,¹⁵ and followed in this country under the Civil Procedure Code of 1859. Thus Mr. Justice Rattigan in delivering the judgment of the Punjab Chief Court in *Chetram v. Bahal Singh*¹⁶ said:—"In a certain sense every fact alleged by one party and controverted by the adverse party, may be said to be in issue. But what is meant by the words '*matter in issue*' within the meaning of the rule we are now considering, is

¹⁴ *Townsend v. Nais*, 20 Am. Dec. 378. ¹⁵ 55 N. H. 390.¹⁶ 1880 P. R. No. 106.

S. 25.] MATTER IN ISSUE DISTINCT FROM MATTER OF EVIDENCE.

something much more precise and definite. ‘It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings.’ In other words, it must be a matter the determination of which has become vital to the case, or the pivot as it were upon which the case turns, and which the Judge is bound to decide in order to render his judgment final and complete.”

Dr. Bigelow does not agree with this view, and after referring to the conflict of authority as to whether a judgment is conclusive only of such matters as being alleged by the plaintiff as the ground of his action, and controverted by the defendant, are necessary to the decision, in contrast with such matters as in themselves alone involve questions foreign to the cause of action, but which in the position of the case become necessary to its decision, he makes “the suggestion that by the weight of authority the judgment is conclusive upon all issues which have become necessary to the decision of the case, whatever their relation to the cause of action.”^a

Mr. Black also, referring to the rule as enunciated by Chief Justice Parker,¹⁷ says—‘We cannot concede its justice or policy, or even its technical correctness The more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not. Numerous cases incline to this view¹⁸ Thus it has been said that the matter in issue or point in controversy is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated’.¹⁹

In this country the Madras High Court has taken the same view, and held in *Rama Sami v. Vira Sami*,²⁰ that the force of *res judicata* would attach to all the objective grounds distinctly found by the Court as the basis of its decision, though no merely subjective grounds could constitute *res judicata*. And “the

^a He refers in support of his view to *Barrs v. Jackson* ²¹; *Bouchier v. Taylor* ²²; *Thomas v. Ketteriche* ²³; *Railroad Co. v. Schutte* ²⁴; *Perkins v. Walker* ²⁵; *Faught v. Faught* ²⁶; *Morse v. Elms* ²⁷; *Attorney-General v. Chicago R. Co.* ²⁸; *Boswell v.*

¹⁷ 31 Ind. 738, 739.

¹⁸ *Trayhorn v. Colburn*, 66 Md. 277.

¹⁹ *Smith v. Smith*, 4 Fed. Rep. 363.

²⁰ 11 M. H. C. R. 277.

²¹ 11 Fed. 582.

²² 4 Bos. P. C. 565.

²³ 103 F. 8, 119.

²⁴ 10 Vt. 144.

²⁵ 98 Ind. 470.

²⁶ 111 Mass. 151.

²⁷ 112 Ill. 520.

²⁸ 60 Barb. 617.

identity of the question” said Holloway, J., in *Chinniya Mudali v. Venkat Chella Pillai*,³⁰ “will not be destroyed by the right which in one case is the principal object of the litigation coming in question in the other as a mere condition of the right of which the establishment is specifically sought.” The advocates of this broader conception of a matter in issue generally admit that such grounds are in issue only incidentally or collaterally, and the point will be further discussed in speaking of the matter directly in issue.³¹

26. The expression ‘matter in issue’ should further be taken in Sec. 13 with the qualification introduced by Explanation I., under which a matter alleged by one party may be in issue even if admitted by the other party. A matter in issue distinguished from an issue recorded as such.

In England and the United States of America, facts so admitted are not held to necessarily constitute estoppel.³² In *Boileau v. Rutlin*,³³ Parke, B., observes that the estoppel of a judgment extended to “the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it.” But he added that “the statements of a party in a declaration or plea, though, for the purpose of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated.” For a matter being in issue, it is essential, however, that it should have been alleged by one party and expressly or impliedly denied or admitted by the other.^b

Mr. Justice Tottenham delivering the judgment of the Court in *Shama Churn v. Prosunno Coomar*,³⁴ laid stress on that rule, and said—“In order to constitute the bar of *res judicata*, it is not sufficient merely that an issue shall have been laid down in the previous suit on the same point, but the Explanation I. says that the matter above referred to must, in the

^b An illustration was provided in Bill III to make this clear. “A sues B” said the illustration “for one bigha of land; the Court decrees that A shall recover three bighas. The defendant then sues A for the two additional bighas. The former decree is no bar, because it was not in a matter alleged by one party and denied by the other in the suit in which it was made.”

³⁰ 111 M. H. C. R. 1
³¹ Vide Para. 34

³² 2 Ex. 663
³³ 5 V. C. L. R. 231.

former suit, have been alleged by one party, and either denied or admitted expressly or impliedly, by the other.”³⁵ Thus it would not be sufficient to constitute *res judicata*, that the matter should have been recorded as ‘in issue’; and the fact that the matter relied on in the subsequent suit was determined in a former suit, was held³⁵ even under the Code of 1859 not to bar the subsequent suit, unless that matter should have really been in issue in the former suit.

27. For a matter being really in issue it is not necessary that either party should have been bound to plead it in the suit. It is sufficient for the rule of *res judicata* that it was pleaded by one party and affirmed or denied by the other. Thus in *Wilayati Begam v. Nurkhan*³⁶, N. as a half brother and heir of M., sued M.’s daughter W. *inter alia* for half of a certain kiln, alleging that its other half was his own. W. alleged that the whole of the kiln was M.’s, the Lower Court found that the kiln was the joint property of N. and M., but the High Court set aside that finding. The proceedings ended with a compromise, but the finding was held to be *res judicata* in a subsequent suit by W. for value of bricks alleged to have been wrongfully taken from the kiln by N., who contended that he had half a share in the kiln, even though the former suit was not for that half of the kiln, and the mention therein of N.’s share in it was quite irrelevant. Thus every demand for money claimed as a set-off by the defendant will be considered to be directly in issue between the parties, even though the defendant is not bound to claim it as such; and such a claim, if made, will be a matter directly in issue in the suit, and a decision in regard to it will bar a subsequent trial of that same claim.^d In fact, it appears,

c. The decision in this case no doubt turned to a great extent on the absence of an enquiry as to the issue, but Tottenham, J., went on to say “the decree, in the former suit does not shew any express allegation or any express denial or admission as to what was the present plaintiff’s share.” As a rule, such allegations, denials or admissions are not, and cannot be shown in a decree, and their absence from the decree is altogether immaterial if otherwise shown to have been made in the suit.

d. It was held to bar a fresh suit even under the restricted rule of the Code of 1859, on the ground that the plea of set-off was, in fact, one form of bringing a suit.³⁷ The decision in *Amir Zama v. Nathu Mal*³⁸ is not against this view, as the set-off pleaded in that case was different from the defendant’s claim in the prior suit, and had not been enquired into in that suit.

³⁵ *Mon Roy v. Raj Bansi Koor*, XXV W. R. 391.

Salah munta v. Mohesh Chander XVI. W.

³⁶ I. L. R. V. All. 514.

³⁷ *Abdoola Khan v. Hree Kunto Pershad*, XV R. 252.

³⁸ I. L. R. VIII All. 390.

to be a general rule that an issue not absolutely necessary to be determined, may become *res judicata* if presented by the pleadings, argued by counsel, and in fact decided by the Court.³⁹ In *Ram Krishna v. Vithal*,⁴⁰ a finding on an issue raised by the Court was held to constitute *res judicata*, even though it was not raised clearly by the pleadings; Mr. Justice Farran, observing that if the plaintiff “was not prepared to negative the issue, he ought not to have allowed it to be raised, and it must be taken to have been properly raised.”

28. A matter in issue in a suit is also distinct from the subject-matter, and the object of the suit, as well as from the relief that may be asked for in it, and the cause of action on which it may be based; and the rule of *res judicata* requiring the identity of the matter in issue will apply, even when the subject-matter, the object, the relief, and the cause of action are different. There is a general unanimity as to the matter in issue being altogether independent of the internal character of the subject-matter of the suit.* For instance, if the property in dispute be substantially the same, any addition made in the shape of new buildings erected on the site, since the decision of the prior suit is, of course, immaterial. Even prior to the enactment of the Civil Procedure Code of 1859, Mr. Macpherson observed in his *Treatise on Civil Procedure*[†] that “the subject-matter of the former suit is considered to have been the same, if it was the same in substance, although in the new suit there may be some difference in amount, or some other merely colourable variation.” Lacombe with great force says: “Les changements, augmentations ou diminutions subis par l'objet extérieur de la première instance ne font pas obstacle à l'application de l'exception: ce n'est, ainsi que le dit M. Duranton, que ”

* To show this clearly the following illustrations were provided in Bill III, but omitted from Bill IV along with all other illustrations as unnecessary:—

(c) A. sues B. for a flock of sheep and obtains a decree. This is a bar to a subsequent suit by B. against A. for the flock, although the individual animals composing it may not be the same at the time of both suits, for the character of the whole matter in dispute is the same.

(f) A. sues B. for a piece of land bordering on a river and obtains a decree. This decision is a bar to a subsequent suit by B. against A. for alluvial soil since added to the land, or for trees the growth of the land, or for rent or mesne profits in respect of its occupation, by virtue of the same title under which the land was claimed.

distinction is made in regard to those cases in which the first suit is dismissed on some ground having application only to the interest claimed, but if it is dismissed "après un débat portant sur l'existence ou la validité de la créance, parce que par exemple elle était nulle, prescrite ou payée, l'exception de chose jugée serait opposable au créancier lorsqu'il demanderait le capital." As to the third principle, it is said: "C'est ainsi qu'il a été décidé que lorsque, à l'occasion de la demande du premier terme d'une obligation, et qu'il a succombé, il ne peut plus reproduire la même exception lors de la demande ultérieure des autres termes ;—que l'exception de chose jugée est admissible lorsque la même question de droit est soulevée entre les mêmes personnes, quoique à l'égard d'un autre immeuble, mais alors que les deux actions dépendaient de la même succession ; que lorsque dans une demande en délivrance de certains objets compris dans une cession de droits successifs, il est intervenu un jugement qui a rejeté cette demande en se fondant sur la nullité de la cession, ce jugement a l'autorité de la chose jugée relativement à la nouvelle demande par laquelle la même partie réclame l'entier émolument des droits cédés." The contrary has sometimes been maintained to have been the rule of the Roman Law on the authority of certain texts of juris-consults which mention the identity of *res* among the constituents of *res judicata*. Art. 1351 of Code Civil, which enunciates the French rule, also expressly mentions the identity of *chose*. The vague comprehensiveness of these two words has, no doubt, led to a great deal of confusion and even misapprehension in this respect. Ulpian says however, "*et generaliter exceptio rei judicatar quotiens inter easdem personas eadem questio revocatur ;*" and in another place "*quotiens apud judicem posteriorem id queritur quod apud priorem questum est.*" There are texts of Marcellus, Paulus and Neratuis in which the identity of question is spoken of without any mention of the identity of *res*, and it is contended that the general word *res* in the texts where it occurs should be taken in a restricted sense, so that all the texts may be interpreted harmoniously. Thus Voet in his commentary on the title in the Digest dealing with the subject of *res judicata*, says "*Eadem res intelligitur quotiens apud judicem posteriorem id queritur quod apud priorem questum est.*" Even those who did not accept this view, virtually concurred in the correctness of the principles enunciated by the French jurists, by taking the word identity also in a comprehensive sense. It was said for example,

“s’agit-il de fruits qui n’étaient pas encore créés, *quæ nondum in rerum natura erant*, des intérêts qui n’étaient pas courus, de l’île qui aura pu maître dans les eaux du fonds riverain, ce sera la même objet ; s’agit il de la décision sur la légitimation de la demande, de la pétition a’ herédite après la revendication sans resultat des objet singuliers qui la composent, il ya en décision implicite, et la question qui a été ainsi implicitement résolue était l’objet virtuel du litige, de sorte que, dans tous les cas ou il ya lieu a l’exception, l’on puisse constater la présence de cette indispensable condition de l’identite d’objet.”

These principles are recognized and acted upon in all the civilized countries, in even those countries that have not derived their jurisprudence direct from the Roman Law. In India under the Code of 1859, the Punjab Chief Court held in *Azmat Ali v. Harnam*,⁴⁴ that a decision in a former suit, as to the plaintiff’s right to recover grazing dues, was *res judicata* as regards that right in a subsequent suit for the grazing dues for other animals and for other years. So also in *Lachman v. Lahar*,⁴⁵ a decision as to a certain land not being connected with the *gaddi* of S. and not being alienable by the defendant, was held to be *res judicata* in a subsequent suit brought to set aside another alienation of the same land on the same ground.^f

Under the present Code, their Lordships of the Privy Council held in *Pittapur Raja v. Buchi Sitayya*,⁴⁶ that a previous decision as to a certain person not having been adopted would be *res judicata* in a subsequent suit; and Sir Barnes Peacock in delivering their Lordships’ judgment said:—“It was contended on the part of the plaintiff, that the cases do not establish that an estoppel is binding unless the suit relates to the same subject-matter, but it appears to their Lordships that the cases which have been referred to do not establish that position. In the case of *Outram v. Morewood*,⁴⁷ the second action was not for the same subject-matter for which the first action had been brought. The first action was for damages sustained by the plaintiff in consequence of the wife of Morewood having entered

^f The decision in *Umar Ali v. Shah Ali Mahomed*⁴⁸ is not against this view, as it turned on the difference in the thing, yet what was decided was only that a decree preemption in regard to the sale of a certain share in certain wells would not be *res judicata* in regard to the right of preemption in respect of the sale of another share in those wells. Campbell, J., observing that it was only the ‘principle at issue’ that was the same in

⁴⁴ X. P. R. 157.

⁴⁵ X. P. R. 178.

⁴⁶ L. R. XII. 1. & 16.

⁴⁷ 3 T. R. 1.

⁴⁸ V. P. R.

upon certain mines and taken coal from them before she was married. The wife contended that she was entitled to those mines by virtue of a certain conveyance; but it was found by the Court that the wife was not entitled to the mines, and the Court gave damages against her. Another action was brought subsequently against Morewood, who had afterwards married the lady, for a second trespass committed by them upon the same mines, and the question then arose whether the finding in the first suit, with reference to the damages claimed in that suit, was binding upon the two defendants in respect to the damages claimed against them in the second suit. It was held that it was. There were two distinct claims. The damages claimed in the two actions were distinct; the trespasses were distinct, and yet it was held that the decision in the first case with regard to the damages claimed in the first case was binding in the second case as an estoppel, the matter having been conclusively tried between the plaintiff and the defendant's wife when a *feme sole* in the first case. The case of *Barrs v. Jackson*¹⁹ was also referred to, but there the subjects of the two suits were different. In that case it was held that a decision of an Ecclesiastical Court, holding that the plaintiff was a next-of-kin for the purpose of obtaining letters of administration, was binding in a suit brought in the Court of Chancery for the distribution of the estate. The Ecclesiastical Court decided that the plaintiff was a next-of-kin for the purpose of having administration and managing the property. Subsequently the question was raised in the Court of Chancery whether he was a next-of-kin for the purpose of taking a share of the property. These were perfectly distinct claims. Yet it was held that inasmuch as the Ecclesiastical Court would have had concurrent jurisdiction with the Court of Chancery to try the question with respect to distribution, the decision of the Ecclesiastical Court between the same parties with reference to administration was binding upon the Court of Chancery with reference to distribution." So also, the Calcutta High Court held in *Sundhya Mala v. Dabi Churn*,²⁰ that a suit for a certain portion of A on the ground of A having been leased to the plaintiff would be barred by a decision as to A having not been leased to the plaintiff, but to the defendant, in a previous suit by the plaintiff for another portion of A, with the same allegation as to its having been leased to him. Similarly, Birdwood,

¹⁹ 1 P.D. 682.

²⁰ 1 L.R. VI. Ca. 715.

J., in delivering the judgment of the Bombay High Court in *Ananta Balacharya v. Damodhar*,⁵¹ said :—“ It is true that in those suits, the dispute was as to a piece of land other than the land now in suit. The plaintiffs there, as now, merely alleged that there had been a partition and that they had a separate share ; the defendants there, as now, merely contended that there had been no partition. In the present case it cannot be held that the decision regarding the question of partition affected only the particular piece of land then in dispute, and left the defendants free to urge again in any subsequent suit that the family was joint in all other respects and as to all other property.”^a

In *Dinkar Ballal v. Hari Shridhar*,⁵² Mr. Justice Scott expressed a contrary opinion, observing that “ The land formerly in dispute may have been so small as not to justify further litigation. The land now in dispute is considerable in extent and value. Does acquiescence in the decision regarding the one preclude any question as regards the other ? Both the spirit and the letter of the Section are against such an estoppel.” Mr. Justice Jardine differed however from that view, and said :—“ If that decision had been a final decision in a suit as distinguished from this execution proceeding, it would, in my opinion, have created an estoppel by *res judicata*, the fact that the present suit relates to a different piece of land not being a circumstance taking the decision out of that rule.”

Sir Arthur Collins, C. J., and Handley, J., appear to have held in *Madhavi v. Kelu*,⁵³ that a decision in a former suit was *res judicata* only in regard to the two parambas that were in dispute in that suit, but no reasons whatever were given for this decision, and no authorities were referred to ; and in a later case,⁵⁴ Sir Arthur Collins, C. J., and Wilkinson, J., cited the case of *Pahlwan Singh v. Risal Singh*,⁵⁵ and observed that it was the matter in issue in the suit, which in that suit was the title of the tarwad that formed the essential test of *res judicata*.

^a The decision in *Moro Abaji v. Narayan*⁵⁶ is not opposed to this general rule. West J., in delivering the judgment of a Division Bench, no doubt, observed “ that the identity of the question may be affected by a difference of the *corpus* or object of the litigation, but the point decided only was that in a suit by an Inamdar, a finding as to the plaintiff's proprietary right to the forest (waste) lands attached to the village, would not bar the defendant from setting up in a subsequent suit his proprietary title as against the plaintiff to the cultivated land in the village, as different considerations would apply to the determination of the question of proprietary rights in the two sorts of lands.”

⁵¹ 1 L. R. XII, Bom., 33.

⁵² 1 L. R. XIV, Bom., 209.

⁵³ 1 L. R. XV, Mad., 264.

⁵⁴ *Kunji Amma v. Raman Monam*, 1 L. R. XV, Mad., 497.

⁵⁵ 1 L. R. IV, All., 65.

⁵⁶ 1 L. R. XI.

In *Pahlwan Singh v. Risal Singh*, both the suits were by the obligee for several instalments of the amount of a bond and the interest thereon from the date of the bond. In the former suit, the defendant's contention as to the interest being payable only from the date of the default was overruled, and the interest from the date of the bond decreed, and that decree was held to be *res judicata* in regard to that contention in the second suit. It has been repeatedly said, on the authority of this decision, that it is the matter in issue, not the subject-matter of the suit, that forms the essential test of *res judicata*.^a In *Balkishan v. Kishan Lal*⁵⁷, Mahmood, J., (with whom Sir John Edge, C. J., and Straight, J., concurred) said :—“ There can be no doubt that for purposes of *res judicata* it is not essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation of the plea, The general rule of law may be briefly stated to be that where a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*, but if such previous judgment does negative the title itself, the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation. The rule is recognized both in England and in America, and is well-illustrated by the American writers. Mr. Bigelow, in his well-known work on the law of Estoppels⁵⁸ referring to cases in which there has been no supervenient change in the relative position of the parties, goes on to say :—‘ judgment based solely upon the validity of the demand and not upon facts in avoidance, such as payment or compromise, would doubtless operate as a bar. In the case of an action on a debt due by instalments, as for example, on a promissory note, judgment against the validity of the main

^a The contrary appears to have been held in *ex parte Ador*,⁵⁶ in which the trustee in bankruptcy rejected the creditor's proof as *rezatus* interest, on the ground that the debtors had guaranteed the payment of the principal only. On the case coming up before the Court of Appeal to determine for what amount the creditor could prove, it was contended that a fresh decision as to the interest was barred, but Lindley, L. J., said, “ The order related only to a sum of £11-16-8 for interest up to the date of the receiving order, and the appellant is content to have that sum rejected. The point now before the Court is a totally different one, and ought to be decided upon its merits, although that cause unquestionably renders it necessary to reconsider the construction of the letter in question.” This decision was, however, under the Bankruptcy Law, and the doctrine of *res judicata* was not expressly referred to in it.

obligation itself would preclude the obligee from suing any of the instalments.' The same is the rule approved in Indian cases by the highest tribunals when such questions usually arise as to the amount of rent payable by the tenant, rent of course being a recurring liability."

As examples of the rule laid down by Mr. Bigelow reference may be made to several cases. Thus in *Edgell v. Sigerson*,⁶⁰ a decision in a suit for interest on a promissory note, against the plea of a fraudulent alteration of the note was held to be *res judicata* in a subsequent suit for the amount of the said note. In *Gardner v. Buckbee*⁶¹ also, the suit was on a promissory note. The defendant alleged that that note with another was given for the price of a shop which was sold fraudulently by plaintiff. The plaintiff replied that the issue as to the sale being fraudulent had been decided against the defendant in a former suit on the other note, and that decision was held to be *res judicata*. In *Van Dolsen v. Abendroth*,⁶² and *Cleveland v. Creviston*⁶³, a decision for the plaintiff for the amount of the interest claimed in respect of a bond was held to be *res judicata* in a suit for the amount of the bond, as to the plea of the bond being invalid for fraud, on the ground that that plea ought to have been raised in the former suit. Mr. Herman citing a number of other cases,⁶⁴ says— "In an action on a promissory note where the defence was fraud, and the judgment was rendered for the defendant, the verdict was held in another action on another ground growing out of the same transaction, conclusive evidence of the fraud. . . . On the same principle in an action of *assumpsit* for goods sold and delivered, a verdict against the vendee on the ground that the sale was fraudulent as against the vendor's creditors, is conclusive of fraud in a subsequent action between the same parties for other goods which were not included in the first action."⁶⁵

In *Hughes v. Alexander*,⁶⁶ it was held that if a maker of two notes, having a common defence of the illegality of consideration, failed to plead it in a suit upon one of the notes, he would not be estopped from pleading it when sued upon the other note. The same view appears to have been taken in *Kilander v. Hoover*,⁶⁷ in which the court said: "If it appears that the first judgment involved the whole

⁶⁰ 26 Mo. 543.

⁶¹ 15 Am. Dec. 286.

⁶² 43 N. Y. Sup. 470.

⁶³ 47 Am. Rep. 267.

⁶⁴ *Drake v. Perry*, 55 Ill. 122.
Chasev. Walker, 20 "

⁶⁵ Herm. Comm. 231.

⁶⁶ 5 Duer. 488.

⁶⁷ 111 Ind. 10.

claim or extended to the whole subject-matter, and settled the entire defence to the whole of a series of notes or claims, and adjudicated the whole subject-matter of a defence equally relevant to and conclusive of the controversy between the parties, as well in respect of the claim or defence in judgment as in respect to other claims and defences thereto, pertaining to the same transaction or subject-matter, then the first judgment operates as an estoppel as to the whole. Unless, however, it is made to appear that the defences pleaded to the first claim or demand involved the whole title, or extended to the whole subject-matter of the controversy between the parties, so as to litigate and determine the defendant's liability in respect to the whole transaction, then the judgment is a finality only as to such of the claims and defences as were actually litigated in the first suit."

The weight of authority, however, is against that view. In *Furneaux v. First National Bank*,⁶⁸ Clogston, C. J., in delivering the judgment of the Kansas Supreme Court said: "Where a party makes a defence to an action on a note that was given in part-payment of the purchase price of machinery, and other notes were given as a part of the same transaction and for the same consideration, a defence to one of these notes must be conclusive as to all. As long as the judgment stands unreversed, a party cannot be heard again to urge that defence."⁶⁹ In *Burnett v. Smith*,⁷⁰ the former claim was for the amount of a promissory note for the value of certain goods; the defendant pleaded want of consideration by reason of false representations of the vendor concerning the value of goods sold, and the plaintiff recovered judgment for a part only of the note, and the decision was held to bar a subsequent suit for false representations. The dismissal of a suit for a certain instalment of purchase-money, on the ground of a failure of title occasioned by encumbrances, has been held to be *res judicata* in a subsequent suit for another instalment of the purchase money⁷¹. Where several instalments of money were due on a contract, and the court decided that the contract was such that a suit could be brought for one instalment without impairing the right to subsequently sue for another

⁶⁸ 7 Am. St. Rep.

⁶⁹ *Posters v. Konkright*, 70 Ind.

Guest v. City of Brooklyn, 79 N. Y. 694.

Gaiser Machine Co. v. Farmer, 27 Minn. 428.

... v. Williams, 91 Pa. St. 234.

... v. Road, 40 Am. Rep. ...

... v. Hawley, 30 Kans. 317.

... v. Gray, 80. ...

... v. Watts, 246.

instalment due at the institution of the former suit, it was held that the parties were estopped in a third action from contending that a judgment in a suit for any one instalment merged others due when that suit was brought.⁷² So it has been held that a judgment for a quarter's rent on a lease, will be *res judicata* as regards the execution and the validity of the lease, in a suit for rent on the same lease for a subsequent period.⁷³ On the same principle, a judgment as to a certain person being a partner in a firm will be *res judicata* in every subsequent suit between the parties in which that issue should arise.⁷⁴

A judgment is conclusive not only as to the subject-matter in suit, but as to all other suits which, though concerning other subject-matters, involve the same questions of controversy.⁷⁵ Even Voet in his Commentary on the title in the Digest, dealing with the subject of *res judicata*, says "*Eadem res intelligitur quotiens apud judicem posteriorem id quaeritur quod apud priorem quaesitum est.*"

29. Through nearly all the American cases the principle runs that a judgment directly upon a particular point is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different.⁷⁶ The identity of the objects of the suit is not considered necessary for the application of the doctrine of *res judicata*. Thus in *Gallaher v. City of Moundsville*⁷⁷, a decision in a suit for an injunction to restrain the issuing and selling of certain bonds of a Municipal Corporation was held to be conclusive in a subsequent suit brought to restrain the levy of taxes to pay off the said bonds, on the ground that there was identity in the subject of the two suits, and the question of the validity arose and was necessarily decided in the first suit; Brannon, J., in the judgment of the Court, further saying, "The ground specified in the first bill was more specifically stated than in the second, but only in the fact that it alleged the nullity of the ordinance and bonds to be void, without saying why, leaving it to be inferred from the ordinance and bonds set out. Invalidity of ordinance

⁷² *Lorillard v. Clyde*, 19 Am. St. Rep. 170.

⁷³ *Kelsey v. Ward*, 24 N. Y. 83; *Jacobson v. Miller*, 41 Mich. 90.

Swanton, 53 Me. 100.

Ides, 15 Am. Dec. 256.

Dias, 3 Denio, 278.

⁷⁴ *Brannon v. Camp*, 15 Ohio, 11.

⁷⁵ *Brannon v. Camp*, 43 Vt. 90.

3 Am.

Williams v. Fitzhugh, 44 Barb. 321.

Lynch v. Swanton, 53 Me.

Poyce v. Patch, 132 Mass.

Jones v. Commercial Bank, 78 Ky. 413.

Hanna v. Read, 40 Am. Rep. 609.

Rucker v. Steelman, 97 Ind. 222.

Sketchley v. Smith, 78

11 26 Am

and bonds is the point of both bills, a judicial sentence of their nullity on identically the same facts is demanded, the relief sought by both. On the same principle, a decision in a suit by a wife for alimony, on the ground of desertion by the husband on a given day, which is denied by the husband and found against him, is a bar to an action for divorce by the husband against the wife, based on the desertion of the wife at that same time.⁷⁸ On the same ground, "a judgment for the defendant in trover, for conversion of goods, is a bar to an action against him for money had and received from the proceeds of the sale of the same goods. The Connecticut Supreme Court in *Betts v. Stair*,⁷⁹ laid down in general words: "Although the object and purpose of two actions being different, the judgment in one cannot be used by way of bar to the other, it does not follow that in the second action either party can be permitted to contradict what was expressly adjudicated in the first." In *Harden v. Palmerlee*⁸⁰, the Minnesota Supreme Court said: "That the remedy sought or the mere form of action, may be different, does not prevent the estoppel of the former adjudication." In *Hatch v. Coddington*,⁸¹ the plaintiff sued to recover damages for the wrongful conversion of certain property and subsequently on the same facts, for the possession of that property itself. He based his claim in both the suits upon his right of general ownership and possession of the property, and upon the defendant's wrongful possession and refusal to return it on the plaintiff's demand. It was held that as the subject-matter and the cause of action in both the suits were the same, the judgment in the first suit was a bar to the second. On the same principle, the dismissal of a suit for enforcing a contract is a bar to a subsequent suit for the reforming of that contract.⁸² If the facts are the same, an unsuccessful attempt to secure relief or redress of a higher or more complete nature will often preclude a party from subsequently seeking a lower or lesser remedy. Thus a judgment against a wife in a suit for absolute divorce on the ground of cruelty, is a bar to a subsequent suit by her for a limited divorce on the same ground.⁸³

30. In *Birckhead v. Brown*,⁸⁴ Duer, J., said: "The position that in order to raise an estoppel by a prior judgment,

⁷⁸ *Stinchfield*, 37 Mo.

⁷⁹ *Howe*, 27 Ala. 678.

⁸⁰ *Mon.*

⁸¹ 19 N. W. R.

⁸² *Thomas v. Joslin*, N. W. R. 344

⁸³ *Rep.*

Washburn v. Great Western Ins. Co., 114

Mass. 173.

Great Western Ins. Co., 111

Sykes v. Gaiber, 98 Pa. 81.

⁸⁴ *Wagner v. Wagner*, 36 Minn. 230.

⁸⁵ 38 *Wall* N. Y. 141

the cause of action in the second suit must in all respects be the same as in the first, we feel no difficulty or doubt in rejecting. It is not indeed

Matter in issue distinguished from the form and cause of action, the identity of which not required for *res judicata*.

absolutely novel; but it is repugnant to the reasons of public policy embodied in the maxim, *Interest reipublicæ ut sit finis litium*, upon which the doctrine

of the conclusiveness of a judgment is founded; and so far from being sustained by authority it is contradicted by many decisions." Nor will a change in the form of action affect the operation as *res judicata* of a decision in a former suit. Mr. Freeman observes that "by the rules of the Civil as well as of the Common Law, *res judicata* is not changed by a change in the form of action."⁸⁵ Dr. Bigelow observes that "the fact that the form of action and precise remedy sought are different in the two suits, will not prevent the existence of an estoppel," if the matter in issue is the same. Mr. Justice Rattigan in *Chet Ram v. Bahal Singh*,⁸⁶ quoting with approval Ulpian's well-known text as to the identity of the question, observed that—"so long as the same question of right has been determined between the same parties, the identity of form of action is not requisite." It is familiar law that among Romans, a legatee might have had recourse to the *actio ex testamento* as to the *actio hypothecario*, a vendor might sometimes have had recourse to the *actio ex stipulatu* as to the *actio venditite*, and a partner to the *actio communi dividundo* as to the *actio pro socio*, but the person electing the one, even in case of failure, could not subsequently claim on the other. In the same way, according to the French Law, an heir cannot as such claim successively *par l'action en revindication et par la pétition d'hérédité*, nor can a purchaser sue on account of the same defects in the thing sold both for *l'annulation de la vente et la restitution d'une partie du prix*; because, as Lacombe says, whatever the external differences may be, it is the same question that is presented to the Judge in the two cases; and the bringing of one of the suits sets an obstacle to that of the other, because they present the same question for decision.⁸⁷ Mr. Black says:—"It is a well-settled rule, and one that is supported by a multitude of authorities, that a party cannot, by varying the form of action, or adopting a different method of presenting his

⁸⁵ Fr. Jud. 457.

⁸⁶ XV P. R. 207.

⁸⁷ Lac. Chose Jugée. 121.

case, escape the operation of the principle that one and the same cause of action shall not be twice litigated between the same parties or their privies The cases most frequently calling for the application of this rule are those in which a party attempts to found two separate actions upon a transaction which justifies but one suit."

It has often been held directly by the Courts that when a cause of action admits of several forms, a judgment in a suit in one form is a bar to a suit in other forms. Thus a recovery in an action of covenant has been held, both in England and the United States, to bar an action of case founded on a tort in respect of the same fact.⁸⁸ So a recovery in an action of trespass for taking away the plaintiff's wife is a bar to a recovery in an action on the case for enticing her.⁸⁹ In fact, it appears to be generally agreed upon, that "in all cases, where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury, upon a state of facts which will support either, an adjudication in one, whichever he may elect is upon principle a bar to the other; for his recovery in *assumpsit* establishes a contract and conclusively negatives a wrong, while his recovery in tort conclusively establishes the wrong and negatives the contract."⁹⁰ In *Ware v. Percival*,⁹¹ the Supreme Court of Maine said: "A party cannot divide his cause of action, recover compensation in *assumpsit* by waiving the tort, and then having received such compensation, resort to the tort which has been waived, and in that again recover compensation as though the tort had not been waived. He cannot waive all wrong-doing and recover compensation upon that basis, and then treating the tort once waived as a subsisting grievance, recover damages which are to be assessed upon different principles." In *Thomas*

^a This is in fact merely an illustration of the broader rule, "which forbids a party to assume successive positions in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory."⁹² In *Thompson v. Howard*,⁹³ Graves, C. J., in delivering the judgment of the Supreme Court of Michigan said: "A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

⁸⁸ *Cutler v. Cox*, 16 Am. Dec. 152.

⁸⁹ *Gilchrist v. Hale*, 34 Am.

⁹⁰ *Agnew v. McElroy*, 48 Am.

Knowlton v. New York R. Co., 147

v. Clarendon, 46 Am.

Moore, 65 Am. Dec. 611

⁹¹ 61 Me.

⁹² *Lilley v. Adams*, 108 Mass. 80,

Ann.

v. Sullivan, 40 Cal.

⁹³ 31 Mich. 312

31 La.

v. Joslin, the dismissal of a suit to enforce a contract was held to bar a subsequent suit brought for a reformation and specific performance of that contract. Vanderburgh, J., in delivering the judgment of the Minnesota Supreme Court said: "There was, however, in fact but one contract between the parties, and but one claim or right upon which to base a recovery, though it may not have been fully evidenced by the writing The new issue was merely incidental to the main cause of action."⁹¹ The written contract was imperfect, but the plaintiff chose to rest a suit upon it as it was, and the judgment in the case, until set aside, was mutually binding upon the parties to it, and final as respects the merits of plaintiff's claim, notwithstanding mistakes and omissions in the proceedings, or the failure on the part of either party to make a full presentation of his case by the proper allegations and proofs.⁹⁵ It is manifest that the two actions could not proceed *pari passu* to trial and final judgment in the same court, and that the plaintiff in such case would be compelled to elect, and be bound by his election. Neither can they be so prosecuted successively.⁹⁶ In the last cited case, Gray, C. J., said: "We are of the opinion that the plaintiff, by bringing an action at law upon the policy in its original form, and prosecuting that action to trial, verdict, and judgment, upon the issue whether he had complied with warranty contained therein conclusively elected to consider it as expressing the true contract between himself and the insurance company, and to abandon any attempt to have it reformed in equity. His bill does not assert an equitable right which, although it could not have been secured to him in the action at law, might co-exist with the right asserted by him in that action; but proceeds on grounds wholly inconsistent with those maintained by him in the action at law, and seeks to show that his contract with the defendants was essentially different from that which he alleged, and submitted to the final judgment of the court, in that action." The learned Editors of the American State Reports say⁹⁷ :— "A party having a right to choose either one of two inconsistent remedies, who with full knowledge of all the facts, makes deliberate choice of one mode of redress, is bound

⁹¹ 1 Am. St. Rep. 624.

⁹⁵ *Winchell v. Conroy*, 27 Fed. Rep. 492.

⁹⁶ *Thompson v. Myrick*, 24 Minn. 4.

⁹⁷ s. 176.
bach v.
Rep. 655.

ix, Co.,

Fire Ins. Co., 37

This rule applies only where the remedies are inconsistent, as where one action is founded on an affirmation, and the other upon the disaffirmance of a voidable contract or sale of property.⁹⁹ Where the remedies are consistent and concurrent, the party may prosecute as many remedies as he has.¹⁰⁰

So a purchaser may sue for breach of the contract of warranty or for false representation as a tort, but having sued on tort, cannot afterwards sue on contract.¹⁰⁰ A judgment against a corporation for the price of goods sold precludes an action against it for fraud in obtaining credit for the same goods¹. Mr. Wells says²: "Where a plaintiff may have an election to sue in contract or in tort, a judgment in one form will be an effectual bar to an action in the other form. For example, a judgment against an attorney in a suit brought for the breach of an agreement

b The learned Editors further say³: "Where party having right to elect between action in tort or in contract, waives the tort and sues upon the contract, he cannot afterwards sue in tort, but is bound by his election, and confined to that mode of redress which he first chooses⁴. . . . In *Butler v. Hildreth*,⁵ it was decided that where an assignee, knowing all the facts of the case, brought an action against the vendee to whom the vendor had sold goods in fraud of his creditors, on a note given by such vendee, and secured the demand by an attachment on his property, he thereby so far affirmed the sale and waived his right to disaffirm it that he could not, by discontinuing that action and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them. In *Thompson v. Howard*,⁶ the plaintiff brought an action in *assumpsit* to recover for wages of his minor son, proceeded to trial, and submitted his case to the jury, who disagreed. He then discontinued that action and brought another action for damages for enticing away and harboring said son; but the court held that he had made an election to sue in contract, and could not maintain an action in tort. In *Benedict v. National Bank of the Commonwealth*,⁷ the plaintiff having been induced to make a loan on the security of forged bonds, after discovering the fraud, sued on the contract and attached the money of the borrowers standing to the credit in bank; but, proceedings in bankruptcy having been taken against the defendants in that suit, he discontinued, and brought an action in tort against the bankrupt and his assignee in bankruptcy, claiming that the money in bank was the identical money obtained from him by fraud, and that he was entitled to it as owner. It was, however, held that, by the proceedings in the first suit, the plaintiff had elected to affirm the contract, and was, therefore, barred from bringing a second suit founded in tort. So, on the other hand, where a plaintiff elects to disaffirm the contract and sue in tort, he cannot thereafter affirm the contract in part, and sue thereon⁸. But the vendor of goods, the sale and delivery of which have been induced by fraud on the part of the vendee, does not, by an effort to retake the entire property, which is successful in part only, lose the right to pursue the vendee for the value of the unfound portion, nor is the effort a defence to an action to recover possession against one in whose hands a part is found.⁹

⁹⁹ *Ward v. Day*, 4 B. & S. 337.

Alough v. London, L. R. 7 Ex. 291.

Morris v. Rextord, 18 N. Y. 552.

Bank of Beloit v. Beale, 34 N. Y. 473.

Moller v. Tuska, 87 N. Y. 116.

Strang v. Strang, 102 N. Y. 69.

¹⁰⁰ *Connihan v. Thompson*, 111 Mass. 270.

¹⁰⁰ *Norton v. Doherty*, 63 Am. Dec. 758.

¹ *Caylus v. New York K. S. R. R. Co.*, 76 N. Y. 609.

² *Wells Res. Jud* 259.

St. Rep. 627, 628.

³ *Baker*, L. R. 8 C. P. 350.

Jewett v. Petit, 4 Mich. 508.

Nield v. Burton, 49 Mich. 53.

Bolemond v. Clark, 46 N. Y.

Acer v. Hotchkiss, 37 N. Y. 306.

c. Matter, 3 Lans. 283.

c. Kierman, 3 Lans.

⁴ 5 Met. 49.

⁵ 31 Mich. 309.

⁶ 4 Daly 171.

⁷ *Wile v. Brownstein*, 35 Hun. 1.

⁸ *Powers v. Benedict*, 80 N. Y. 606.

Harvey v. Benedict, 15 Hun. 268.

to enter satisfaction of a judgment and discharge the execution thereon, will be conclusive against a subsequent action of tort to recover further damages from him for directing an arrest under the execution specified in the agreement.¹¹ So, a judgment in trespass *de bonis asportatis*, is a good bar to *assumpsit* for the same goods. If, in the former case, it appears, the plaintiff has no right of property in the goods, he will be held not to have the right to the value of them in the action of *assumpsit*.¹² Mr. Herman also observes, that "an adjudication is conclusive, not only in the proceeding in which it is pronounced, but in every other where the right or title in controversy is the same; although the cause of action may be different,"¹³

. *Res judicata* attaches whether the matter in issue is in the same form of action or another. Thus if an action for abatement of price of a chattel alleged by plaintiff to be unsound, and to have been sold by defendant on a warranty, is dismissed on the ground that it was not unsound, or that the warranty did not cover the unsoundness found, it will bar another suit for rescision of the sale on the ground of the breach of the warranty."¹⁴

Mr. Wells says: "It is on the principle that the cause of action needs not to be the same, although the issue must be the same, that the rule rests, namely, that a suit on one promissory note or bond will be conclusive upon another executed under the same circumstances, if also sued on."¹⁵ In *Louchand v. Dias*,¹⁶ Branson, C. J., said, referring to a number of cases, that in them, "the cause of action in the second suit was different from the cause of action in the first, but the former determinations were held to be conclusive because the same question was determined in the first suit on which the second depended." Mr. Black says:—"There are sometimes cases, in which a party proceeding upon a certain theory as to the legal effect of a given transaction or state of facts finds himself unable to substantiate his view of the case, but afterwards, without any change in the facts, but acting upon a different theory, renews the litigation in a different form. Here we must apply the test generally agreed upon as the proper means

¹¹ *Smith v. Way*, 9 Allen, 472.

¹² *Bull v. Hopkins*, 7 Johns., 21.

¹³ *Herman*, 6

¹⁴ *Herman Comm.* 95.

¹⁵ *Wells Res. Jud.* 243.

¹⁶ 3 Denio, 243.

of ascertaining the identity of the cause of action. *viz.*, whether the same evidence would support both suits. If not, there is no bar arising from the former judgment."¹⁷

In *Devray Krishna v. Halambhai*,²⁰ the dismissal of a previous suit in which the plaintiff elected to sue the defendants as principals was held to bar a second suit on the same contract in which the same defendants were charged as responsible agent under a trade usage. "The plaintiff, on his contract with the defendants," said West, J., "sued them as principals. They answered that they had been mere agents. The plaintiff, then had the option either of admitting the agency, but adding 'yet by trade usage you are responsible like principals,' and asking for an issue on that point, or of not admitting the agency as likely to militate against his interests suing on the particular contract upon which he rested. He chose the latter course; the issue was framed on the question of whether the defendants were liable as principals. By accepting this and not in due time asking for another issue based on an assertion of a *del credere* agency or one similar to it, the plaintiff, we think, conclusively elected to treat the contract as one binding the defendants as principals. Whether he then succeeded on the issue or not, could make no difference for the purposes of a second suit. The cases are common in which a plaintiff having the choice of an action of tort or on contract is barred, once his selection is made, from a second action, whatever may be the event of the first. Still less is it allowable, we think, when a plaintiff has chosen to treat a transaction as creating a contract of one description, to sue a second time upon it as creating one of a different description producing a different kind of liability." It was contended in this case that the subsequent

c This test is of quite a general application. Speaking of it as a test of the identity of the issue in the two suits, Mr. Freeman says:—"Whatever may be the form of action, the issue is deemed the same whenever it may in both actions be supported by substantially the same evidence."¹⁸ If so supported, a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different.¹⁹

¹⁷ *Elgin Watch Co. v. Meyer*, 29 Fed. Rep. 225.
Woodland v. Newhall's Adm'r, 31 Fed. Rep. 434.
Schriver v. Eckenrode, 87 Pa. St.
¹⁸ *Hitchin v. Campbell*, 2 W. Bl. 837.
Outram v. Morewood, 3 T. R.
v. Brown & Sandf. 124.

¹⁹ *Doty v. Brown*, 53 Am. Dec.
 Vide to same effect—
Taylor v. Castle, 42 Cal. 371
²⁰ 1. L. R. I. Bom. 87.

suit would lie, because it would have to be supported by different evidence from that required to sustain the claim he formerly advanced; but West, J., admitting the correctness of this test, said:—"The origin of the litigation was identical for the two suits, and the essential facts would have to be established by the same evidence. The difference is merely one partly of the construction of the contract which is not a matter of evidence, partly of usage, having the effect of annexing to the contract certain incidents not expressed and not expressly excluded. Such a usage, if submission to it was optional, would not have the operation sought to be ascribed to it; if binding, it would operate as a local law. This if it had already been ascertained, it would be the Judge's duty to apply, apart from any evidence adduced in the case; if not, he would, of course, receive evidence of its existence and acceptance as a law, but taking evidence of this kind would not make the case a different one in the sense necessary to exclude the operation of estoppel. It would not be different evidence as to the facts of the case; as to these the same witnesses would have to be called to depose to the same particulars, but additional information supplied to the Judge as to a point of the law, and which he might equally well obtain from books, decisions or any other authentic sources of instruction. Applied therefore in the intended sense, the proposed test is fatal to the plaintiff's right to prosecute the present suit."

It has sometimes even been held that a party who alleges and fails to establish a certain state of facts is not estopped as against the same person and concerning the same subject-matter, from alleging a different and inconsistent state of facts.⁹⁸ Thus a suit for the value of certain property on the ground of its having been sold will not, in the event of the sale not being proved, bar a suit for the use of the property.⁹⁹ So a suit will lie for money paid under a mistake of fact, notwithstanding the dismissal of a prior suit brought for the same money on the ground of the defendants' fraud. Mr. Black in justification of this view observes¹⁰⁰ that "it is true the subject-matter is the same, but the cause of action set up in the former suit was, as shown by the result, merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and

⁹⁸ *McQueen's Appeal*, 49 Am. Rep. 592.

⁹⁹ *Rider v. Union India Rubber Co.*, 28 N. Y. 379.

¹⁰⁰ *Bl. Jud.* 875.

supported by a right theory of the facts. Further, the evidence necessary to sustain the second action could not, if offered in the first, have altered the result. And this is the one recognized test of identity."

31. It is also a general rule, that to give a decision on a matter in issue in a former suit, the effect of *res judicata*, that matter must have been substantially and directly in issue in that suit. The necessity of a matter having been directly in issue has, no doubt, sometimes been denied; but the weight of authority has always been clearly in favour of the affirmative view. It may be now considered as generally agreed upon that, "the estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen and been passed upon¹," and that "the principle upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the litigation."² It was said in the *Duchess of Kingston's case* that, "neither the judgment of a Court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable." Some text-writers and judges have expressed an opinion to the contrary, on the ground that as to a matter cognizable and decided by a Court of conclusive jurisdiction, any other court in which it comes into issue has no authority to examine into the merits of the judgment, but must take the matter as conclusively decided." But as observed by Dr. Bigelow, "no distinction appears to have been established between Courts of concurrent and of exclusive jurisdiction in this respect." In *Queen v. Inhabitants of Hartington*³ it was still more broadly laid down that "the conclusive effect of the prior judgment extends to any matter which it was necessary to decide and which was actually decided as the ground-work of the decision itself, though not then directly the point at issue," but the words 'at issue' appear to have been used there in a technical and restricted sense, and the word 'directly' in a vague sense, and, if so, the decision would amount only to this

¹ *Lewis and Nelson v. Appeal*, 57 Pa. St. 153.

² *Horton v. Hamilton*, 20 Tex. 603.

³ *Idr.* Ph 11. Ev. 11.

⁴ 4 El. and B.

that a finding on a matter in issue would be binding even though that matter was not recorded as being in issue.

32. To bar the trial of a subsequent suit, it is, of course, as enacted by Sec. 13, necessary that the said matter should be substantially and directly in issue in the subsequent suit also, as otherwise the disposal of that suit would not depend on the decision of that matter. A decision on that matter will, however, bar the trial of that issue in any subsequent suit, even when it comes into controversy in it only incidentally, or along with other matters on which its decision may primarily depend. In the *Duchess of Kingston's case*, it was said as to a judgment *in rem* that the judgments of a court of exclusive jurisdiction, directly upon the point, would be conclusive upon the same matter coming incidentally in question in another Court. The same is true, however, of a judgment of every competent Court, as to every matter coming in question in the same or any other Court. Lord Chelmsford in *Mackintosh v. Smith*,⁵ made a distinction between the two cases and said, "the judgments of courts of concurrent jurisdiction are evidence only where the same matter comes distinctly in issue between the same parties. The judgments of courts of exclusive jurisdiction are evidence whether the matter arises immediately or is the matter directly in issue." This distinction appears not to be supported by any other case.

33. The word 'substantially' appears to signify what was indicated by the use of the phrase "in effect though not in express terms" in Lord Hardwicke's statement of the doctrine of *res judicata* in *Gregory v. Molesworth*.⁶ There appears to be a general unanimity of opinion, that for a matter being in issue it is not necessary that it should be distinctly and specifically put in issue by the pleadings. Some cases even go so far as to hold that for the identity of the matter in issue it is not necessary that an issue should have been taken in the former suit upon the precise point which it is proposed to controvert in the subsequent suit.⁷ It is considered sufficient that that point was essential to the former judgment,⁸ and every point which has been in issue even by necessary implication and which must

When a matter is substantially in issue.

⁵ W. 1207, 1 Gray, 1105, 7 Nov. 21.
⁶ 6 C. Kingsbury, 62 Am. Dec.

necessarily have been decided in order to support the judgment is held concluded.” In *Chinniya Mudali v. Venkata Chella Pillai*,¹⁰ Mr. Justice Holloway said, that a judgment “has the effect of establishing positively in favour of the defendant all the objective grounds of the decision which have led to the dismissal of the suit,” and without the establishment of which the suit could not have been logically or legally dismissed. “If both parties” said their Lordships of the Privy Council in *Soorjomonee Dayi v. Suddanund*¹¹ “invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of *Mitna v. Fuzl Rub*”, wherein it was held that, in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid.” The word substantially, as observed by Sir Richard Garth in *Denotundhoo v. Kristo Monce Dossee*¹² includes the supposition “that a plaintiff may evade the application of the rule, merely by varying his form of pleading, or by describing the set-matter of his suit, or expressing his rights, in different

34. There is a conflict of opinion as to when a matter is said to be directly in issue. There is no general agreement as to the exact sense which ought to be given in the construction of the rule to the word *directly*, or to the words *and collaterally* which are often used in opposition to it. Mr. Freeman speaking of the latter expressions says, that they are usually intended by the Courts to designate facts which though they bear upon an issue, and tend to show on which side of it the truth is, are not, though conceded to exist, necessarily conclusive; “and therefore as not being proved or disproved by the judgment, though controverted at the trial, and perhaps passed upon by Court or jury and exercising a controlling effect over the verdict and judgment.”¹³

⁹ Board v. M. P. R. R. Co., 34 Wis. 134

¹⁰ 111 M. H. C. R. 134

¹¹ XII. B. L. R. 204

¹² XIII. M. L. A. 573

¹³ 1 C. R. 11 Cal

¹⁴ F. J. 21

The Calcutta High Court in *Mahima Chandra v. Raj Kumar*¹⁵ even held that in a suit for damages for the taking away of fruit, the title to the land from which they were taken would be in issue only collaterally, and a finding therein as to the said land being the joint property of the parties would not bar a suit by one of them to have a summary *thakbast* award in regard to that land set aside as wrong. Jackson and Tottenham, J.J., also expressed a similar opinion in *Doorga Ram v. Kally Kristo*¹⁶, though their decision was rested on the ground that the second suit was brought for the express purpose of determining the plaintiff's title, and was on an entirely different cause of action. In *Manoppa Mudali v. McCarthy*¹⁷, Innes and Kernan, J.J., incidentally, but more correctly, expressed it as their opinion that if in a suit for damages for wrongfully cutting and carrying away bamboos from certain land, the question of title to that land should be raised, it would be directly and substantially in issue, if the question was one which it was material to the plaintiff or defendant to raise; and the title could not be said "to be only incidentally in question, if it was the title to the land that was the foundation of the title to the trees."

Relying on the alteration effected by Act XII of 1879, the appellant in *Toponidhee Dhirj Gir v. Sreeputty Sahani*¹⁸ contended, that the question of his heirship was not directly in issue in the prior suit in the Moonsiff's Court. "That suit, he contends," said White, J., "was only to establish his title to the rent of a small portion of the deceased's estate, while the present suit relates to the entire estate, and seeks for a confirmation of his possession of a portion of that estate and for *khas* possession of the remainder, and that in the former suit the question of heirship came only indirectly and collaterally before the Court. The prayer of the appellant's plaint in the Moonsiff's Court appears to claim, under his alleged title as heir, possession of the land. But reading the prayer by the light of the statements in the body of the plaint, and of the issues settled by the Moonsiff, I think that what the appellant really sought was to establish his legal title to the rent. . . . Whether that suit, however, was brought to establish his title to the land or the rent, appears to me to make no difference. His title to either rested on the same basis, and the same issue would have to be tried, *viz.*, whether the appellant was *chela* and heir of the

¹⁵ 1 B. L. R., A. C. 1.
¹⁶ 111 C. L. R. 549.

¹⁷ 1 L. R., III Mad. 192.
¹⁸ 1 L. R., V. Cal. 332.

Mohunt. In the present suit also the right to any relief depends entirely upon his having this issue determined in his favor. The ground-work of the decision in the suit in the Moonsiff's Court is the same as what, if the present suit succeeds, must be the ground-work of the decision in the Subordinate Judge's Court, and the same evidence to establish the appellant's heirship as was given in the Moonsiff's Court must be given again before the Subordinate Judge. I am unable, therefore, to see that the matter directly in issue in this suit was not also directly in issue in the suit in the Moonsiff's Court." So also in *Chet Ram v. Bahal Singh*,¹⁰ the suit was to recover a certain share in the estate of one H. deceased, on the ground of the plaintiff being related to him equally with the defendants, and it was contended that the question of title as dependant on heirship was *res judicata*, as in a former suit by some of the same plaintiffs to recover the same property from H.'s widow on the ground of her having forfeited her life-interest in it by her remarriage, it was contended, though for the first time in the Chief Court, that the plaintiffs not being the nearest heirs of H. were not entitled to bring that suit; and on remand the proprietors of D. were made parties to the suit, and the plaintiffs held not to be entitled to bring the suit, as not being the nearest heirs of H. "It was," said Rattigan, J., "raised by the pleadings in the Chief Court, and it was the very basis of the plaintiffs' action, for as they claimed to succeed as heirs, and their title to be recognised as such was disputed, the Court was bound to decide that question as preliminary to any other that arose in the case, the result of which would necessarily depend upon the plaintiffs' establishing their position, upon which in fact their claim proceeded, of being the nearest heirs of H. It was only in that capacity the plaintiffs could sue at all, and failing to prove that they were entitled to claim it, their suit would necessarily fail. And fail it accordingly did, when it was found that they were not the nearest heirs. This finding also by necessary implication, though not in express terms, must be held to have established that, as against the then plaintiffs, the defendants had a superior title, for it was only on that basis that the judgment against the plaintiffs proceeded or could be supported, and it must therefore be held to have been so decided in effect by that judgment." Barkley, J., also said,—“an attempt has been made to argue that the question was not directly in issue in the previous suit, but as the present defendants were made

¹⁰ XV F R 261

¹¹ 20 Gregory & Moleworth, 3 Aik 636.

parties expressly in order that it might be determined whether the plaintiffs could maintain their suit, and the result of the decision in the negative was that the suit was dismissed, this contention cannot be supported." So also when in a suit for restitution of conjugal rights by a Mahomedan husband, the wife pleaded non-payment of dower, and the fact of payment was put in issue between the parties and decided, it was held that the decision would bar the trial and decision of the same issue in a suit instituted by the wife for the dower, in a different Court, only three days after the institution of the suit for conjugal rights.²¹

Sir Richard Garth, C. J., in delivering the judgment of the Full Bench of the Calcutta High Court in *Gobind Chunder v. Taruck Chunder*²² (J) said: "The plaintiff in the former suit is the same person as the defendant No. 1 in this; and he sued to recover from the occupying tenant the rent of the property now in dispute. In that suit one of the plaintiffs (representing and claiming the same right under the same title which is now claimed by all the plaintiffs) intervened as a defendant, and he resisted the then plaintiff's claim to the rent, upon the ground that he (representing the present plaintiff's interest) was entitled to it as the owner of the property. An issue was, accordingly, framed in that suit, as to whether the then plaintiff (the present defendant No. 1) was entitled to the rent as owner of the property in question as against the then defendant who represented the present plaintiffs. This question was contested between them in that suit upon the same title and materials which are now brought forward in the present suit. . . . It is argued that the claim in the former suit was for rent against the tenant; that the only issue in that case was whether the plaintiff was entitled to that rent, and that the question of title raised by the intervening defendant was only incidental to the main issue.

(J) In *Gobind Chunder v. Afzul Rabbani*,²³ the facts of which were rather similar, Sir Richard Garth, C. J., expressed a contrary opinion, observing that the question of title to the land as between L (represented in the subsequent suit by plaintiff) and A (who had intervened as owner of the land of which L claimed the rent and been made a defendant) was merely raised incidentally to the main question. This was a mere *obiter dictum*, however, and Mr. Justice Field correctly pointed out that "if the Court had tried the issue of title, the finding upon that issue must have had the effect of *res judicata* as between the parties, but inasmuch as that issue was not tried, the question raised thereby was not heard and decided, and therefore the matter is not *res judicata*, having regard to the language of Sec. 13."

²¹ *Ganbara Begam v. Moetta Beg.* XV P. R. 209. | ²² I. L. R. IX Cal. 426.
²³ I. L. R. III Cal. 112.

But as between the plaintiff and the intervening defendant the question, and the only question, was that of title, and as the defendant in that suit chose to intervene and to raise that question between himself and the plaintiff, he and those whom he represented, must take the consequences of their intervention." And this decision was followed in *Bemola Soondury v. Panchanun*²⁴ and afterwards in *Llewellyn v. Ram Sunder Sahoy*.²⁵

In *Inayat Khan v. Rahmat Bibi*²⁶, Turner and Spankie, J.J., observed that "in a suit for rent instituted in a Small Cause Court the question of title would only be determined incidentally," but on the ground that "it would be inequitable to rule that no special appeal lies in a suit of such a nature, and nevertheless to hold that the decision of the issue of title in the trial of such a suit should finally estop the parties from raising the same issue in a suit brought to try the title." On that same ground, a similar construction was often placed on the words "incidentally" and "collaterally," but such an argument has no weight any longer, as it is now enacted that to constitute a decision *res judicata*, it is necessary that the Court should have had jurisdiction over the subsequent suit also.

35. It appears to be generally agreed upon, that a fact

A fact of which the existence is not necessary to a judgment cannot be in issue directly.

cannot be in issue directly, when the judgment can be correct, whether that fact exists or not.²⁷ Thus where in a suit for rent fixed by a lease, the defendant pleads for abatement on the ground that the land was actually less than that entered in the

lease (the terms of the lease admitting of abatement or enhancement with reference to the actual area), and it is found that the land is really more than that entered in the lease, and a decree is given for the claim, the amount fixed by the lease, the decision as to the excess cannot constitute *res judicata* (K)²⁸ because the only issue between the parties in the former suit

²⁴ 1 L. R. 111 Cal. 705.

²⁵ 11 L. R. 50.

²⁶ 1 L. R. 11 Cal. 97.

Hubbott, 123 N. Y., 520.

c. Laird, 75 Am. Dec., 472.

c. Buchler, 120 Pa. St. 441.

Lorance v. Platt, 67 Miss.

Donnan v. Gynn, 25 W. Va. 715.

²⁸ Ekram Mundul v. Holodhur, 1 L. R. 111 Cal. 271.

was whether the land demised was or was not less than or equal to the estimated quantity. Nor is the decision in *Bussun Lall v. Chundee Dass*²⁹ in conflict with that view. That was a suit for a declaration that certain lands held by the plaintiff as a tenant to the defendant at a certain rent comprised an area of eight drones. The suit was held by Sir Richard Garth, C. J., and Jackson and Pontifex, JJ., to be barred by a decision in a previous suit in which the defendant had sued the plaintiff for that same amount of rent as payable for a smaller area, and the defendant alleging that the amount was due in respect of the larger area, it was found after taking evidence on that point, that rent was payable for the smaller area.

On the same principle it was often held under the Code of 1877,³⁰ as well as of 1859, that a suit for the redemption of a usufructuary or even of a simple mortgage, would not bar a subsequent suit for redemption, if the former suit had been dismissed on the ground of non-payment of the mortgage-amount, or decreed conditionally on the payment of the amount found to be due and payable in respect of the mortgage(*L*): though if that amount was a point in issue in the former suit, the Court would be barred from enquiring into the correctness of that finding, and the only point which the Court would be able to try in the subsequent suit as to repayment would be that of the amount repaid after the date up to which the amount repaid was the point in issue in the former suit." In the United States of America also, it has been held that "if a suit is brought to procure the entry of satisfaction of a mortgage, and the judgment is that the mortgage is not satisfied because a specified amount remains unpaid, this judgment is, in subsequent controversies between the parties, conclusive that the mortgage was not paid, but the amount due is still unsettled, because it was not in issue in a former suit³¹." In *Cram v. Boss*,³² in a suit for attachment, in addition to the indebtedness for which judgment was prayed, plaintiff set out a note not then due, alleging that it was a lien upon the attached property, and

(*L*) The decision in *Muhammad Samiuddin Khan v. Mannu Lal*³³ is not opposed to this view, as Straight and Brothurst, JJ., dissented therein from the decision in *Gulam Hossein v. Alla Rukher*,³⁴ which had been followed in *Anrudh Singh v. Shoo Prasad*,³⁵ on the ground of the special provisions of the Transfer of Property Act

²⁹ 1 L. R. IV Cal. 656

³⁰ *Nathu Singh v. Rura*, XVI P. R. 23.

Dinku Doyal v. Suroo Golam Singh, XXII P. R. 172

Chara v. Paran Babh, 2 Agra Rep. 256

Shibbu Mal v. Paura Singh, XII P. R. 224.

³¹ *Campbell v. Consalus*, 26 N. Y. 613.

³² 48 Iowa, 433.

³³ 1 L. R. XI All. 396.

³⁴ 1971 All. H. C. R. 62

³⁵ 1 L. R. IV All. 461.

asking that any surplus arising from the sale of that property be applied to its payment. The defendant acknowledging the validity of the note, pleaded a counter-claim, and the note, which matured in the meantime, was offered in evidence and considered in arriving at the decision. This finding was held not to be *res judicata* in a subsequent suit on the same note on the ground that no judgment had been prayed on the note in the former suit, and the note was not in issue as a cause of action under the pleadings. The Court said, "the attachment only issued for the claims due. Therefore the allegations in the petition, in reference to the note sued on in this action, must be regarded as surplusage. It is further alleged in the answer: 'that said cause (the former action) was submitted to the jury and the said note in this action sued on was . . . offered in evidence, both as a cause of action and ground of recovery and to reduce or defeat defendant's counter-claim thereon; that the jury in the determination of the question of indebtedness. . . considered the note sued on in this action, and in arriving at their verdict charged B. with the full amount thereof, and allowed C. the full amount of the said note.' A judgment is only conclusive on the matters which are directly in issue, and not those which are brought incidentally into a controversy during a trial. Ordinarily, the pleadings in a case constitute, make, define and limit the matters in issue.⁵⁶ If, under the pleadings in the former action, the plaintiff could not obtain judgment on the note if introduced in evidence and the proof entitled him thereto, it would seem necessarily to follow that no judgment could be rendered which would bar his right of action thereafter. It is wholly immaterial what the jury did. Whether they allowed, disallowed or considered the note in arriving at their verdict. The only question is, did the note sued on constitute an issue in the former action? If the rule be established that the action taken by a jury determines what has been adjudicated, much uncertainty must prevail. Their action, whether right or wrong, can have no effect on the question presented." In *Mohanlal v. Ramdial*,⁵⁷ the obligor of a bond had sued for the recovery of the bond and for some money that was alleged to have been paid in excess of the amount due on it, and the courts had dismissed that suit, because they found that the plaintiff owed a certain sum to the defendant on the bond, the High Court in the judgment on appeal observing that, "if the

⁵⁶ *Allen v. Newberry*, 8 Iowa, 65.

⁵⁷ 1 L. R. II A 11, 843.

parties are again obliged to come into Court, the account must be again taken." In the subsequent suit for that sum, a Full Bench held that that observation was a mere *obiter dictum*, and the account could not be re-opened, and that the question of that sum was directly in issue in the former suit. Sir Robert Stuart, C.J., did not dissent from that view only on account of the inconvenience of re-opening the account, and the uncertainty of the result. It is surprising how the Judges who concurred in the decision did not notice that the question in issue in the former suit was only whether the amount due on the bond and the excess alleged to have been paid had really been paid. That alone was necessary for the disposal of that suit, as it could not but be dismissed if *anything* was found to be due on the bond, and the question of the exact amount due was, therefore, altogether immaterial for its disposal. The rule that a judgment or decree is not conclusive of anything not required to support it is not a mere rule of construction, but "an unyielding restriction of the powers of the parties, of the Court, and of the jury."³⁸ Thus if the language of a decree is general, it will be restricted to the issues in the case³⁹; and even if a decree in express terms, purports to affirm a particular fact or rule of law which is immaterial to the issue, and on which the controversy does not turn, the decree will not conclude the parties in reference thereto⁴⁰. The declaration in a decree of the character of the title of one of the parties, when the consideration of such character is foreign to the case and unnecessary to its disposal, has no force as *res judicata*⁴¹.

36. A considerable extension has been made in the signification of the 'matter directly in issue' by Explanation II, which provides that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." The rule as thus extended is an old one, however, and has long been acted upon in British India as well as in other countries. It has been enunciated in several cases; and an adjudication is said to be final and conclusive, not only as to the actual matter determined, but as to every other matter which the parties might have litigated and have had decided as incident to or

³⁸ V. Ind. 491.

³⁹ Benveniste v. Bourg, 16 La. Ann. 76.

⁴⁰ People v. Johnson, 97 Am. Dec. 770.

Coit v. Tracy, 20 Am. Dec. 110.

⁴¹ Fulton v. Hanlow, 29 Cal. 450.

essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defence.⁴² It has been often held by the Courts that a party cannot try his action in part, and that a judgment is conclusive, not only of the matters contested, but as to every other thing in the plaintiff's knowledge which might have been set up as a ground of relief in the first suit.⁴³ Thus Andrews, J., in *Pray v. Hegeman*,⁴⁴ said—"The estoppel extends to everything material within the issues, which was expressly litigated and determined, and also to those things which, although not expressly determined, are comprehended and involved, in the thing expressly stated and decided, whether they were or were not actually litigated or considered;" though "the matter claimed to be barred must, of course, be such that the party was bound to present it."⁴⁵ Lord Cairns in his judgment in *Phosphate Sewage Company v. Molleson*,⁴⁶ observed that "it is not the case, and it would be intolerable, if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying that since the former litigation, there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before; but it being in addition to the facts I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be, if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence, have been ascertained by me before." In *Henderson v. Henderson*,⁴⁷ Wigram, C.J., said: "the plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." The rule was laid down in similar words by Lord Kenyon, C.J., in *Greathed v.*

Bates v. Spooner, 43
 v. *Harris*, 36 Barb. 85
 v. *Mayer*, 41 Mich. 90
Batill v. Taul, 34 Am. Dec. 698.
 v. *Quimby*, 46 Ill. 90

14 La. Ann.
 Y.
 43 *Horan* Am. Rep.
harwood v. Knight barb 267.
 46 L. R. IV
 47 3 Hare 115.

⁴⁸ 7 T. R. 425.

⁴⁹ E. G. by Wood V. C. in *Sampson v. Pogo*, 29 L. J. Ch. 67.

⁵⁰ 11 L. M. H. C. R. 320.

⁵¹ 30 L. J. Ch. 241.

⁵² XI. M. L. A. 73.

⁵³ *Vide* *Woomat*.

XI B. L. R. 169.

Doorga Perand v. Doorga Konwar, 1 L. R.

IV. Ch. 190.

⁵⁴ 1864 P. R. No. 142.

⁵⁵ 1 Y. and C. C. C. 365.

⁵⁶ 1 Phil.

been recognized as applicable before Act VIII of 1859 was superseded by the later Codes with the fuller exposition of the general doctrine of *res judicata*. . . . It has already been held in the case No. 96, P. R. 1881,⁵⁷ that the non-tender of compensation by a landlord before serving notice of ejectment under the Tenancy Act is a matter which may and ought to be made ground of attack by a tenant contesting such notice, and that the omission so to advance it estops him from suing for such compensation, after his first suit has failed." In *Deokee Nundun v. Kalee Pershad*,⁵⁸ a coparcener as a mortgagee of another coparcener's share in the joint estate, claimed a lien on the surplus sale-proceeds of that share in the hands of the Collector who had sold it for arrears of revenue, and though merely a 'precautionary' dependant in a former suit brought by a person who had purchased it in execution of a decree against that other co-parcener, he was held estopped from putting forward his mortgage, by the decree in the former suit in which he had not pleaded it. "If the claim," said Phear, J., in delivering the judgment of the Court "which the present plaintiff now makes against K. (auction-purchaser) be well founded, it would have constituted a good defence to the action which he formerly brought against him and others. It is his own fault that he did not set up that defence at that time. The necessity of putting some term to litigation is the foundation of the rule that any issue which is material to the rights of the parties in the matter of suit between them, whether actually contested or not, shall not afterwards be raised in a subsequent suit between the same parties." Similarly in *Maktum v. Imam*,⁵⁹ a certain person, alleging that he had Rs. 1,000, sued for Rs. 5,000, as the residue of his share in his deceased father's estate, and obtained a decree for Rs. 700 worth of property; and the decree was held to bar a subsequent suit by that brother for a moiety of the Rs. 1,000, on the ground that the decision on which the decree was based implied that the excess of the whole of the father's property was in his hands; and therefore, he could not afterwards come forward and say that instead of an excess he had only a deficiency; that he had an opportunity of bringing the question of the moiety of Rs. 1,000 before the Court, and having lost that opportunity could not

rest a suit upon it again. So also in *Hari Narayan v. Ganpatrav*,⁶⁰ a decree in favor of the defendants in a former suit by them against the plaintiff's father for a partition of certain joint lands, in which they admitted having a certain village as their separate property, was held to bar a suit by the plaintiff for his share of that village, on the ground that the plaintiff's father was bound to advance the plea of that village being joint in reply to the defendant's claim for partition; Kembal, J., observing that "when a plaintiff seeks to recover a share of property in the hands of the defendant, it is necessary for the Court to decide whether, under the circumstances of the case, he is entitled to that partition; and no Court would decide that a plaintiff who withheld property which he might, and therefore ought to bring into hotchpot, had a right to the partition of the property in the possession of the defendant." Similarly in *Dinomoyi Debia v. Anungo Moyi*,⁶¹ a suit for rent and ejectment, Prinsep, J., in delivering the judgment of the Calcutta High Court, after referring to a previous suit by the plaintiff against the same defendant for rent for prior years, said:—"The defendant set up only one plea in bar of ejectment, *viz.*, that his tenure was an *Istimrari* one, and failing to prove this, a decree was passed against him. He now raises the further plea that his tenure is both permanent and transferable . . . If there was any force in the contention that his tenure is transferable as well as *Istimrari*, he should have urged it in the former suit. As it is, he was content to rest his defence simply on the allegation that his tenure was *Istimrari*, and having done so he cannot be allowed to take up this new ground of defence. This is the law as now set forth in the second Explanation . . . It is true that that Code does not apply to the present case, but the law which it enacts is not new law." So also in *Baldeo Sahai v. Bateshar Singh*,⁶² the defendants, having purchased an estate in the plaintiff's possession, sued to recover possession, and the plaintiff resisted the suit only on the ground that he was the auction-purchaser of it, and the defendants got a decree, and the plaintiff then sued claiming a right of preemption in respect of the property, but he was held by a Division Bench of Allahabad High Court to be debarred

⁶⁰ I. L. R. VII. Bom. 272.| ⁶¹ IV. C. L. R. 690.| ⁶² I. L. R. I. All 75.

from enforcing such claim, on the ground that he should have asserted it in reply to the former suit. And that decision has been followed, though reluctantly, under the Code of 1877 in the case of *Narain Dat v. Bhairo Bukhsh*,⁶³ in which case Straight and Pearson, JJ., said:—"It is not without doubt that we feel ourselves constrained by prior decisions of this Court, I. L. R. 1. All. pp. 76 and 316,⁶⁴ and second appeal No. 304 of 1878, decided the 20th May, 1878, and by the terms of Sec. 13 to hold that the view of the Lower Appellate Court is correct. It is true that the former suit was for the redemption of a single mortgage on the entire eight *annas*, but the present defendants were parties to it, and came into Court asserting their right to participate in the redemption by virtue of purchase of the four *annas* made by them from P. It would, therefore, seem that their status to figure in the proceeding at all should have been made the subject of attack by the now plaintiff, then defendant, setting up by plea his right of pre-emption. Moreover, to make such a defence the more effective, he might have applied to have P joined as a party to the suit. Neither of these courses, however, did he adopt; and upon the authority of the cases quoted it would appear that, by not having done so, he has defeated his present claim. When the former suit was brought, the full cause of action now made the ground of his present suit by the plaintiff-appellant had accrued to him, and we think it was incumbent upon him in the former proceeding to assert his right, which, if established, to the extent of such a plea as we have already indicated, must, so far as the defendants-respondents, then plaintiffs, were concerned, have proved fatal to their title to redeem."

The principle, that a defendant is bound to bring forward all his available defences at a proper opportunity is, as observed above, recognized in the American and the English Courts also. It has, for instance, been held that in a petitory suit the defendant is bound to plead all the titles under which he claims to be owner, and a judgment in plaintiff's favour will be *res judicata* in regard to any title that the defendant omitted to plead.⁶⁵ So a decision in plaintiff's favor in a suit involving title to a large tract of land has been held to bar a subsequent suit by the defendant

⁶³ I. L. R. II. All. 100

⁶⁴ *Snaffer v. Smiddy*, 14 La. Ann. 521; *Caston v. Perry*, 21 An.

for a homestead on a portion of the land, claim to which as a homestead had not been asserted in the first suit.⁶⁶ In *Doak v. Wiswell*⁶⁷ a decision for a land was held to bar a suit by the defendant for compensation for buildings erected by him on the land, on the ground that he ought to have urged his claim in the suit brought against him.

38. While a defendant is bound to bring forward and establish any defence to the plaintiff's cause of action which he may have, or be debarred from pleading it in any subsequent suit, this does not hold good with respect to an independent claim against the plaintiff, or one which, though connected with the same transaction, is of such a nature that it may be made the basis of a separate suit or authorize affirmative relief to the defendant." In some of the American states, the defendant is, under special legislation, bound to plead his demand, if it arises out of the transaction set forth in the plaint as the foundation of the suit or is connected with the subject of the suit. But there is no such law in British India; and Sec. 111 of the Civil Procedure Code, which provides for a claim of set off, is strictly permissive in its provisions. The corresponding Rule 3, Order XIX under the Supreme Judicature Act is also permissive; nor has the equitable rule of set off recognized in this country⁶⁸ and England ever been held to be imperative.

The decision in *Mahabir Pershad v. Macnaghten*⁶⁹ is not against that view. In that case, the former suit was by a mortgagee for the amount of the mortgage, and the mortgagor only pleaded that there was a specific agreement to the effect that the rents of the mortgaged property

⁶⁶ The contrary has sometimes been said to be the rule in England. Thus Baron Parker said in *Mondel v. Steel* ⁷⁰ that "to the extent that he (the defendant) obtains or is capable of obtaining, an abatement of price, he must be considered as having received satisfaction for the breach of contract." But, as pointed out by Mr. Justice Hannen in *Dress v. Hedges* ⁷¹, that *dictum* had reference to the facts of the case in which the plaintiff did claim and did obtain an abatement, and the particular point decided in *Mondel v. Steel* was that one who had fairly obtained an abatement of the price of work done, in an action against him, by reason of a breach of contract in its execution, would not be precluded from suing for special damage resulting from the breach of contract; and that case leaves undecided the question whether he was *bound* to obtain the abatement in the action in which he was a defendant, or might recover it in a cross-action.

⁶⁶ See *14 C. D. 101* (1891) 107.

⁶⁷ 31 M. & W. 355.

⁶⁸ *Prasad v. Nath*, 18 L. R. XX Cal. 1.

Mill Co.,

⁶⁹ L. R. 15 L. A. 107.

⁷⁰ 9 M. & W. 859.

⁷¹ L. R. 6 Q. 1.

due by the mortgagee should be set off against the mortgage-debt, and added that he would sue separately for the rents. The agreement not being proved, the mortgagee got a decree, and himself purchased the mortgaged property at the auction-sale in execution. The mortgagor also got a decree for rent due to him, apparently without any objection on the ground of *res judicata*. He then sued to have the sale of the mortgaged property set aside as null, to have the mortgage-debt extinguished by setting against it the rents which had already accrued or might afterwards accrue. Their Lordships of the Privy Council held that the proper occasion for enforcing this equity was in the suit for the mortgage-money, and that as, if the equity existed on the ground of the mortgage and the lease being parts of one complex transaction, it ought to have been pleaded in that suit, the mortgagor was barred from bringing a suit afterwards on its basis. Dr. Bigelow has discussed the question at considerable length, and says:—“If there is an independent cause of action to each party upon a breach of the contract by the other, neither in reason can be compelled to allege his defence of a breach in a suit by the other. Every cause of action carries with it the right to put it into judgment; and that there is a separate and independent cause of action given to each party results necessarily from the fact that either party may sue the other for a breach. As one cause of action cannot in itself alone, when merged in judgment, carry another independent cause of action with it, it is difficult to understand how a judgment for the plaintiff without plea can extinguish a counter-right of action by the defendant, however closely connected the two claims may be. Every one has the right to try his own case, and in his own way; to plead fraud is a permission, not a requirement. The defendant in the first action may not then be able to prove the facts which he relies upon in the second suit; and he is justified in reason in not raising an issue upon them. The contrary doctrine would often work manifest injustice. A man who had by fraud obtained of another a note on demand could bring suit upon it at once, before the maker had had time to ascertain the facts, and the judgment would bar the just rights of the defendant.”

39. The real difficulty in connection with the point lies in determining the matters that give an independent cause of action to the defendant, or that a defendant not only may but ought to bring forward in his defence in a suit; and in discovering the nature of the connection that must exist between the cause of action and the matters which the defendant is bound to plead at the risk of being debarred from pleading in any subsequent proceedings. It was pointed out in some of the earlier cases that—"where the prosecution of an action will impeach a former judgment, it cannot be maintained, but where the claim does not impeach the former judgment, but arises out of the fraud, breach of trust, or neglect of the party, the action may be maintained." Mr. Black, in enunciating the rule, says³.—"Where judgment goes against the defendant, and he afterwards sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action, or in direct opposition to them, the former judgment is a bar. In other words, if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, that negation must be made good when the facts are first set up. For afterwards he cannot deny what the judgment affirms to be true. But if, out of the same transaction or state of facts, each party may acquire a right of action, — so that the facts on which the plaintiff recovered may very well be true, and yet the facts on which the defendant seeks to recover may be equally true,—then the former judgment is not a bar to the maintenance of the present suit." Dr. Bigelow says⁴,—"a judgment is conclusive only in respect of matters necessarily inconsistent with it. Now, the fact of the ill-performance of a contract is not inconsistent with a judgment upon the contract by the other party. Such facts usually go only to the reduction of damages; and the other party has thus a right of action. If the counter-right should go further and entitle the defendant himself to damages, it might be argued with plausibility that this would be inconsistent with any right of action in the

Claims not inconsistent with the plaintiff's claim need not be urged in defence.

plaintiff; but that cannot appear until the defendant's proof is all in. And hence, as it cannot be known in advance whether the right of action of the plaintiff in the first suit will be overbalanced, he cannot say that the second suit is necessarily inconsistent with the first judgment. . . . Even in the case of an action upon a contract to which fraud might have been set up, a judgment upon the contract is not necessarily inconsistent with the existence of fraud. Fraud does not make a contract void, but only voidable; and a person may elect to treat the contract as binding and sue for the fraud." The general correctness of this theory is universally admitted, but there is a conflict of opinion as to its application in individual cases. In regard to fraud itself, it has often been held that a decision on a contract in favour of the promisee will be *res judicata* in a subsequent suit by the promisor on the ground of the contract having been induced by fraud. In support of this, reference may be made to the cases in which it has been held that a decision for the amount of a note or claim for goods sold will bar an action for fraud in obtaining the note or goods.⁷² On the same theory of the inconsistency of the plea with the claim, it used once to be held that a judgment for a debt would not bar a suit for the recovery of the amount paid towards its satisfaction, if the payment were not pleaded in the first suit. It is now settled, however, that a partial payment must be pleaded in defence, or else be forever concluded by the judgment, and that if the debtor fails to plead it and the creditor gets a decree for the full amount of the debt, the debtor cannot sue for the amount he had paid towards the debt.⁷³ It has even been held that a decree obtained for the full amount of a note will bar a suit for the recovery back by the defendant of the illegal interest alleged to have been included in that amount. Even a decision for freight in favour of a carrier will bar a suit by the owner for destruction of the goods while in the carrier's possession, as such destruction relieves the owner from the liability for payment of freight.⁷⁴ So also a decision for the keep of a

⁷² *Dunham v. Bower*, 31 Am. Rep. 370.

Arnold v. Kye, 8 Baxt. 110.

Howell v. Sharp, 21 H. N. 93.

⁷³ *Woodward v. Hill*, 6 W. R. 143.

⁷⁴ *Quincy v. Collins*, 4 Ad. & Kl. 338.

Corey v. Gale, 11 Vt. 620.

Baker v. Stinchfield, 57 Me. 333.

Loring v. Mansfield, 17 Mass. 304.

Robb's Case v. Stekney, 30 Ala. 482.

Greenbaum v. Elliott, 40 Am. Dec. 145.

Kirkham v. Brown, 40 Am. Dec. 66.

Davis v. Murphy, 45 Am. Dec. 740.

Doyne v. Reilly, 30 Am. Dec. 188.

⁷⁵ *Footman v. Stetson*, 52 Am. Dec. 634.

⁷⁶ *Dunham v. Bower*, 31 Am. Rep. 370.

horse will bar a suit against the keeper for using and converting the horse contrary to the agreement for keeping him.³⁰ However, a decree for the full amount of a note given along with some cash in full payment of the price of some goods will not bar a suit for the recovery of the excess price paid for the goods.³¹

A suit for damages for the breach of a warranty in connection with a sale of goods does not bar a subsequent suit by the vendor for the price of goods sold,³² and though a contrary rule has sometimes been held to apply in the converse case of the earlier suit being for the price,³³ yet the weight of opinion is decidedly in favor of the view that that also will not bar a subsequent suit by the purchaser on the breach of warranty.³⁴ The question was discussed at length in *Barker v.* _____ in which Chief Justice Cooley, in delivering the judgment, said :—“ When a party declares upon a contract of warranty contained in a sale of chattels, he necessarily affirms the validity of the contract. The warranty does not stand independent of the sale, but is inseparably connected with and forms a part of it. It is only one of the stipulations in the main contract ; and it can neither be alleged, or proved, or judicially found, except as a part of the sale. It is evident, therefore, that the judgment in affirming the warranty, also affirmed, of necessity, the contract of sale ; and that the existence and validity of that contract were therefore necessarily within the issue in that case and are now *res adjudicata*. . . . When a vendee puts an end to the contract of sale, for the failure of the vendor to perform, and brings suit for the recovery of damages, the object of the suit is to place the plaintiff, so far as the law can accomplish that result, in *status quo*. It is obvious that in such a case the inquiry is of the first importance, how much has been paid on the contract, since such payment constitutes usually the first and leading item of damages. The purpose of such a suit is to recover back the sums which the plaintiff had paid out upon and in consequence of a contract the benefit of which he has lost through the non-performance by the other party.”³⁵ The issue, therefore, necessarily covers and the trial

adjusts all questions of payment of the purchase price; and the vendor is for ever precluded from maintaining a suit for the same or any unpaid portion thereof. But we do not understand that an inquiry concerning the amount of damages sustained by a breach of warranty necessarily involves the question of the payment of the purchase-price. If the contract is a valid one, it is immaterial to the plaintiff's action in such a case whether he bought for cash or upon a credit not yet expired. The object of the suit is foreign to the question of payment. He sues to recover the difference between the actual value of the articles received on the contract and what their value would have been had they answered the warranty; and unless the vendor defends on the ground of non payment of the purchase price the Court does not concern itself with that question. The parties in such a case are at liberty to settle their controversies in one suit or by cross-action." Dr. Bigelow referring to this judgment says; "There can be no better reason why the purchaser, the first suit being by the vendor, should be required to allege the inferiority of the goods than for requiring the vendor to rely upon the contract price in a suit by the purchaser. Indeed, the excuse for omitting the defence by the purchaser is stronger in many cases than any which the vendor can present; for, it often happens that the purchaser is not able at the time of the vendor's suit to ascertain the real degree of inferiority of the goods."

. In *Thoreson v. Minneapolis Harvester Works* a suit for damages for breach of warranty was held by the Minnesota Supreme Court to be not barred by a judgment on the notes given for the purchase money, and the Court said: "The facts constituting the cause of action in this case were not involved in the former action upon the notes, and could only have been properly presented for adjudication therein by affirmative allegations and proof on the part of the defendant in such action, in the nature of counter-claim or recoupment. Formerly, in such an action, the practice allowed a full recovery of the purchase price and left the vendee to seek his remedy by a cross-action. Now the vendee has his election to plead the breach of contract of warranty in reduction of damages in an action brought by

40. There is a considerable conflict of opinion as to whether a decision in plaintiff's favour in a suit on a contract is a bar to a subsequent suit for the non-performance or improper performance of the contract. Proper performance of a contract is not matter in issue in a suit on that contract.

In England, such a suit was in *Davis v. Hedges*,⁶⁹ held not to be barred by a decree for the price of the work in a prior suit in which the non-performance was not alleged. Mr. Justice Hannen said—"It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken. Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price? We think that there is none, and that there are some strong reasons why he should not. It appears from the passages above cited from the judgment in *Mondel v. Steel*⁷⁰ that the present practice of allowing the defence or the inferiority of the thing done to that contracted for to be applied in reduction of damages was introduced (on the same principle that the statutes of set-off were passed) for the benefit of defendants. It would greatly diminish the benefit, and in some cases altogether neutralize it, if the defendant was not allowed an option in the matter. The hypothesis is that the plaintiff for the price is in default. The conditions on which he can bring his action are usually simple and immediate. The warranted *chattel* has been delivered, or the work contracted for has been done; and the right to bring an action for the price, unless there is some stipulation to the contrary, arises. On the other hand, the extent to which the breach of warranty or breach of contract may afford a defence is usually uncertain; it may take some time to ascertain to what amount the value of the article or work is diminished by the plaintiff's default. It is unreasonable, therefore, that he should be able to fix the time at which the money value of his default shall be ascertained. In many cases

the extent to which the value of works may be diminished by defect in their execution may be altogether incapable of discovery until sometime after the day of payment has arrived. Surely, the right to redress for the diminution of value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price." The learned Judge further observed that the contrary rule would tend to complicate and increase litigation, from the fact that defective performance of work generally involved consequential and recurring damages, by reason of the necessity of repairing the work, in which case a separate suit would lie even on the authority of *Mondel v. Steel*. Mr. Justice Lush, concurred in the same view, distinguishing the case from those cases¹¹ in which the defendants had been compelled to pay money under judgments which subsequent evidence, then inaccessible, showed should never have been recovered. "In these cases," said the learned Judge, "the sole ground of action was the payment; and what the plaintiffs sought by the action was to undo that payment and to place themselves in *statu quo*. In the present case the cause of action is the breach of contract; that cause of action existed before and was independent of the payment." So also in *Houstoun v. Sligo*,¹² a suit for the rectification of a written lease was held to be not barred by a judgment against a tenant on the lease in a suit for trespass by his landlord, at which the alleged mistake, if pleaded, would have been insufficient reply. In the United States also, a decree for the balance of contract price for building a wall was held not to bar a suit for damages for delay in completing it.¹³

It has also been held there in some cases that a decision in plaintiff's favour on a contract is conclusive as to the plaintiff having done every act and performed all the stipulations that were conditions precedent to the right to bring the suit, and that the defendant is estopped from afterwards alleging that the plaintiff had failed to do what the judgment declared he had done.¹⁴ This conflict of opinion has been particularly marked in suits for medical services and cross-actions for malpractice and negligence.

In *Gates v. Preston*⁹⁵, a suit against a surgeon for negligent performance of professional services was held barred by a judgment in his favor in a previous suit for the value of the services, the Court observing that “when there was, in the answer of the defendant, an express and direct admission by him of the plaintiff’s right to recover, and a consent to the entry of a judgment for a certain amount, it was an admission on the record of all the facts which the plaintiff would have been bound to prove, on a denial of the cause of action alleged by him in his complaint.” This decision was followed in *Blair v. Bartlett*⁹⁶ in which Folger, J., after observing that a judgment is conclusive as to every thing necessarily involved in the issue, and that the value of the services was necessarily involved and passed upon, said, “But if of value they could not have been useless; and if of use they could not have been harmful; and if not harmful they could not have been *mala praxis* in the performance of them. Hence it is *res judicata* between these parties, that there was not the malpractice, on the allegation of which in this action, the plaintiff here seeks to recover.” The same has been held in other cases in the New York State.⁹⁷ New Jersey, Arkansas and some other States also have followed the same view.⁹⁸ The leading case on the other side is that of *Ressequie v. Byers*⁹⁹ in which the Court said: — “The plaintiff’s claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case. He was not compelled to make the defence before the Justice that the defendant’s services were of no value, in order to save his rights. He had his election either to recoup his damages *pro tanto* in the Justice’s Court, or go for his entire claim in this.” In *Sykes v. Bonner*,¹⁰⁰ the suit was against a surgeon for carelessly, negligently, and improperly treating plaintiff’s arm, to which the defendant pleaded an *ex-parte* judgment in his favour in a suit against the present plaintiff to recover for his services in attending the plaintiff for her arm, and the plea was held untenable on the ground

that it was not necessary, in order to entitle the plaintiff in the former suit to recover, that he should prove that he was not guilty of any negligence in his professional treatment. It was argued in that case on the authority of *Gates v. Preston*,¹ *Bellinger v. Craigue*,² *Davis v. Tallcot*,³ and *White v. Merritt*,⁴ that the judgment recovered for the services was a direct admission on the record by the plaintiff in the subsequent case of all the facts which the plaintiff would have been bound to prove on a denial of the cause of action alleged there, that the recovery by the plaintiff was dependent on a full performance of his duties in the treatment of his patient, and that the plaintiff was estopped in the subsequent suit from questioning that fact in any controversy on the same agreement for services. Mr. Justice Hagon in delivering the judgment of the Court said, "We do not see how the plaintiff in the (former) case was bound to prove that he was guilty of no negligence in his treatment before he could recover for his services. It was enough to prove the services and their value. . . . the effect of that judgment cannot be extended or enlarged by argument or implication to matters, which were not actually heard and determined." The same has been held in *Goble v. Dillon*,⁵ the facts of which were similar to those of *Sykes v. Bonner*. These

cases rest on the ground that the defendant's action for mal-practice "is not merely a defensive action in respect of the action brought by the physician; but it is a cross-action for damages, and he may be entitled to recover of the physician many times the amount which the physician could recover for his services if his action were undefended. If it were an action where the recovery would go strictly in abatement of the amount which the physician might recover for his services, then it would be logical to drive the patient to litigating it by way of counter-claim in the action, brought by the physician; but as it is not such an action, there is no propriety in making his failure to litigate it at that time an estoppel against him."

41. The same rule is applicable also to decisions by default or on confession, the points absolutely necessary for decision in the former suit being held to have been in issue in that suit. In *Param Singh v. Lalji Mal*,⁵ the plaintiff sued in 1875 to recover possession of immovable property which the defendant had obtained in 1873 in execution of a decree passed in 1861 on the basis of a deed of conditional sale executed by the plaintiff in 1855 in favour of the defendant, and the plaintiff alleged that the deed was executed in order to protect the property against the claims of the plaintiff's son, and sought to set it aside on account of the defendant's breach of an agreement whereby the defendant in 1856 stipulated that the plaintiff's possession would not be disturbed. The defendant pleaded estoppel, but the plea was rejected; and Turner, J., in delivering the judgment of the Court said, "Nor is the decree of 1861 a bar to the suit. The question now raised is, whether or not the respondent suffered judgment to go by default in that suit on the understanding that the decree would not be executed without his consent, or, if executed, that the property would be restored to him. This neither was, nor could have been, determined in the former suit; consequently, the respondent is not estopped by the decree of 1861. But, if it be held that he is so far bound by the decree, that he cannot contend that the appellant was not entitled to possession, in virtue of the mortgage and foreclosure, the respondent is, in our judgment, entitled to

insist upon the agreement, and on the strength of it, to recover back possession from the appellant." This decision was dissented from in *Chenrirappa v. Puttappa*⁹, in which West, J., in delivering the judgment of the Court said; that it "is not supported by any corresponding judgment, nor are we aware of any that supports it. It seems opposed to Sec. 13 of the Code of Civil Procedure and to the general principles partly embodied in that enactment. The uniform concurrence of the authorities, as indeed of the positive law of procedure, also in the doctrine that as between the parties *res judicata pro veritate accipitur* forces us to decline to yield to the particular precedent that we have last discussed." In this case the plaintiff having purchased a house in 1871, with a view to save it from his creditors, got the sale-deed to be executed in favor of C, his son-in-law; and took possession of the house ostensibly as C's tenant for a nominal rent of Rs. 5 per annum, but no rent was paid. C got an *ex-parte* decree for the possession of the house against the plaintiff, and when he applied for execution, the plaintiff sued for the declaration of his title to the house, alleging that the deed and the decree were sham and collusive; but the suit was held barred by the *ex-parte* decree. West, J., in delivering the judgment of the Court, said:— "It would be opposed, it seems, to this final effect of a decree, and it would certainly afford a wide opening to fraud, if a judgment-debtor in ejectment could come forward, with a fresh suit to establish his right on equitable grounds to the very property which by the decree he has been ordered to deliver to another. Even under the double system of Courts in England it was recognized that a decree of one superior Court could not be set aside by another. Nor could relief be given, in equity, against a judgment of a Common Law Court on a ground equally available as a defence in the latter."¹⁰ Here, however, the ground taken by *Puttappa* was equally available to him as a defendant in *Chenrirappa's* suit. Supposing, therefore, that we could divide the Subordinate Judge's Court into two, the new suit by *Puttappa* ought to have been rejected. . . . In the same Court the existence of a judgment unreversed is enough on general principles,¹¹ even without resort to Sec. 13 of the Code of Civil

⁹ 1 L. R. N. D. 702.

¹⁰ Story J., 1 L. R. 4.

¹¹ 11 F. & C. 32 Evans.

Procedure, to prevent the same matter being litigated again. This appears plainly from *Huffer v. Allen*¹². . . . In the present case the parties are the same; the proceeding is not collateral; it is in direct contradiction to the decree, and proposes to avoid it by setting one judgment up against another. This incongruity the law will not tolerate.¹³ The present plaintiff as defendant in the previous case made wilful default; and in the judgment in *Trevivan v. Lawrence*¹⁴ it was resolved: 'If a *scire facias* be brought against the issue in tail upon a judgment in debt against the ancestor, and he being warned makes default, he shall not come afterwards and say that he is tenant in tail; so if he plead any other matter, and it is found against him. Also they held the judgment upon the *scire facias* is sufficient title in the ejectment, and the first judgment need not be given in evidence.' A verdict negating a right pleaded by a defendant estops him in a subsequent action from asserting that right as plaintiff against the same party.¹⁵ The point becomes one adjudicated, and so even in a judgment by default does the point whereon judgment is given for the plaintiff.¹⁶ It is *res judicata*, and the matter so determined cannot be withdrawn from the effect of the decree while the decree stands unreversed. See *per* Knight Bruce, V.C., in *Barrs v. Jackson*¹⁷, where that learned Judge, after admitting that particular facts may be again controverted, adds 'provided the immediate subject of the decision be not attempted to be withdrawn from the operation so as to defeat its direct object.' If a defendant proceed by means of a new suit instead of getting a judgment set aside¹⁸ when it is opposed to right, so, too, it seems can a plaintiff defeated in his suit. This would lead to infinite confusion, and would make the administration of the law impossible.¹⁹

42. A decision in undefended suits is, however, conclusive only as to what it actually professes to decide as determined from the pleadings, and only as to the facts necessary to form the grounds of the decision, so far as they can be discovered from the decision itself. It appears to

In undefended suits, only matters absolutely necessary for their decision are deemed to be in issue.

¹² L. R. 2 Ex. 15.

¹³ *Castrique v. Behrens*, 30 L. J. Q. B. 103.

¹⁴ 2 Sm. L. Ca. 550 (5th Ed.).

¹⁵ *Doe v. Oliver*, 2 Sm. L. Ca. 606, (5th Ed.)—
vide p. 775 (5th Ed.).

¹⁶ See *Philpott v. Aslett, &c.* Notes
Hampton, 2 Sm. L. Ca. 373; vide p. 421, 8th
Ed.: *De Medina v. Grove*, L. R. 10 Q. B. 172.

¹⁷ L. Y. and C.C.C., 307.

¹⁸ 11 Foth. Obs. 357.

¹⁹ *Ferrer's Case*, 3 Cok. Rep. 271.

be generally agreed upon that an *ex-parte* decision estops the defendant only from setting up any matter in a subsequent suit which is inconsistent with any traversable allegation in the former suit necessary to support the judgment. It concludes the defendant only from denying the averments of the declaration and contesting the facts actually put in issue; and if he has omitted to plead a fact in confession and avoidance of the plaintiff's demand, he may afterwards plead it in another action by the same plaintiff in respect of the same subject-matter; as for subsequently accruing rent under the same lease upon which the first action was brought. It does not estop the defendant as to any matter which is not inconsistent with such allegations, although that matter might have been pleaded as a good defence to the former suit, the defendant being at liberty in the subsequent suit to raise all such facts as were not actually or necessarily in issue in the suit decided *ex-parte*, "while facts directly in bar, such as payment, or probably in bar *pro tanto*, such as part payment, cannot, whether pleaded or not, be made use of by the defendant." Thus an *ex-parte* judgment for rent under an agreement for a lease was held not to bar the defendant in a subsequent suit by the same plaintiff for another instalment of rent due under the same agreement and setting up another one in its stead." The rule of the Indian Courts appears to be

a. This was an action for rent under a building agreement. The defendant pleaded a subsequent agreement changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former suit against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which suit the defendant did not set up the defence pleaded in the second suit. On demurrer, the replication was held bad. Williams, J., in his judgment, said:—"It is quite plain that there is no authority expressly in point to sustain the doctrine, that if there had been a previous action between the same parties founded upon the same contract, and the defendant had suffered judgment by default in that action, he is precluded from setting up in a subsequent action any defence which he could have pleaded in bar to the former, notwithstanding the defence is in confession and avoidance of the agreement which is the foundation for the action. I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel. But the defence set up here is quite consistent with every allegation in the former action. The plea admits the agreement, but shows by matter *ex post facto* that it is not binding upon the defendant." Willes, J., also said:—"It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time to go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. I think we should do wrong to favor the creation of this new device in the law."

the same. It was held by Phear and Morris, JJ., in *Goya Pershad v. Tarinee Kant*²¹ that an *ex-parte* decree for rent would be evidence only of the amount of rent payable. On the other hand, Sir Richard Garth, C.J., and Birch, J., held in *Birchunder v. Hurrish Chunder*²² that an *ex-parte* decree for rent for a particular year would be *res judicata* as to the rate of rent in a subsequent suit for another year's rent. In *Puncharam v. Krishna Ravi*,²³ the same was held, and the Judges said—"when an undefended suit goes to trial, the plaintiff is put in the same position that he would have been if the defendant had appeared and simply said—"I deny all your allegations," in which case the plaintiff would have to prove everything which would be necessary for him to prove in order to make out his case, and therefore every material allegation in his plaint may be said to be denied because he has to prove them The plaintiff had to prove that the rent which the defendant had to pay on account of this tenure was at the rate of Rs. 7 and odd annas a year, and he also had to prove the amount of the rent in arrear, so that, all these allegations having to be proved, they are within the meaning of Sec. 13 impliedly denied by the defendant." On a consideration of all these cases, it was held by a Full Bench in *Modhusudan Shah v. Broe*,²⁴ that "the mere statement of an alleged rate of rent in the plaint in a rent suit in which an *ex-parte* decree is made, is not a statement as to which it must be held that an issue within the meaning of the section was raised between the parties, and that neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*; assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case."

The American Courts were rather backward in giving even such effect to *ex-parte* judgments.²⁵ Their view has

²¹ It was, for instance, long held there, that if the defendant did not plead part payment, and an *ex-parte* judgment was therefore given for the full claim, that judgment would not bar a suit for the recovery of the amount that had been repaid.²²

²² XXIII. W. R. 149

²³ I. L. R. 3 Cal. 303.

²⁴ 2nd Appeal No 1271 of 1897 decided 22nd March

²⁵ I. L. R. XVI.

²⁶ *Smith v. Weeks*, 26 Barb. 403.
Rowe v. Smith, 16 Mass. 390.

been changing, however, and coming over to that of the English Courts. It is thus now settled even there that in any case where the defendant neglects a legal opportunity to set up a partial payment, he cannot afterwards seek credit for it by a new suit. In fact, at present, "there are cases going to the opposite extreme, and holding that the judgment is conclusive as to all defences which might have been urged against the plaintiff's demand."²⁶ Mr. Black says "It is necessary to distinguish between matter which would go in avoidance of the action and such as would bar it."²⁷ The correct rule appears to be, however, that an *ex-parte* decision involves an admission only of the material facts well pleaded in the declaration,²⁸ and thus such a judgment upon one of several promissory notes, founded upon one and the same illegal consideration—no issue upon the fact of consideration being tendered in the plaint—does not preclude the defendant from setting up in a subsequent suit, upon another of such notes, the defence of illegality of consideration. The distinction between an ordinary decision and an *ex-parte* decision is very well illustrated by a recent decision of the Supreme Court of Appeals in *Lawson v. Conaway*,²⁹ in which it has been held that if a physician sue for his services, and there is no appearance by the patient, defendant in that suit, recovery by the former does not estop the latter from bringing a cross-action for malpractice; but if he appear unless the record show that it was not to defend, but solely to disclaim the waiver to his own right, he is estopped by the recovery.³⁰ Holt, J., dissented from this decision, and it has been strongly contended that "the distinction as based on the appearance of the defendant as distinct from a legal notice to him is untenable. If he is bound to litigate the question of malpractice when the physician brings an action for compensation, he is equally bound to do it whether he sees fit to appear or not. If he has a right to reserve it and make it the subject of a future action, then he has the right although he does appear."³¹ Mr. Justice Field in *Cromwell v. Sac*,³² in speaking of the rule said: "A judgment by default only admits for the purpose of the action the legality of the demand in claim

²⁶ *Alley v. W. Thurn*, 77 Ala. .
²⁷ 81, Jud. 872.
²⁸ 81, Jud. 902.
²⁹ *Adams v. Adams*, 25 Minn. 72.

³⁰ 16 S. R. R.
³¹ XXVII Am. Law. Rep. 471.
³² 94 U. S. 330.

or suit; and that it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding."³⁵ In *Bodurtha v. Phelan*³⁴ in a suit on a note given for the price of a horse, the defendant pleaded a breach of warranty and obtained a reduction for it from the amount of claim. On appeal there was a decision *ex-parte* against the defendant for the full amount of the claim, but it was held not to bar a subsequent suit for the breach of warranty. A similar view was taken in *Bascom v. Manning*³⁵ in which case also the defendant pleaded the breach of warranty, but judgment was given against him for default. It was argued in support of the subsequent suit for breach of warranty being barred that the plea in the former suit was not withdrawn and raised the same questions. The Court observed however, that "the fact that there was a judgment upon a default makes it as certain that this counter-claim was not passed upon and settled by an actual adjudication, as though the plea had been formally withdrawn." In *Davis v. Tallcot*,³⁶ a suit for breach of contract to furnish machinery of a specified kind, was held barred by a judgment in defendants' favour in a previous suit by them for the price of the machinery in which the plaintiff pleaded that breach, but before the trial withdrew it and confessed judgment. Gardner, C. J., in giving the judgment of the Court admitted that by withdrawing their claim to damages, the plaintiffs (then defendants) did not waive their right to rest upon their defence; but observed that "as the cause of action and the indebtedness of the defendants were by the complaint made dependent on a full performance of the contract by the parties who instituted the suit, the concession of the defendants was equivalent to an admission on the record to that effect." An *ex-parte* judgment against an executor or administrator is *res judicata* as to the sufficiency of assets in his hand for payment of the debt.³⁷

c. Butlin, L. R. 2 Ex. 665.
c. Alexander, 5 Duer. 497.

³⁴ 52 N. H. 132.
³⁵ 12 N. Y. 184

³⁷ *Blanken Baker v. Bank*, 85 Ind. 470.

As an instance of a decision on confession, reference may be made to the case of *Hunt v. Brown*,^{37*} in which the maker of a note sued upon an agreement in relation to a compromise of the payee's claim, after the payee had, regardless of the agreement, recovered in a prior suit in which the maker having first pleaded a general denial and payment, finally offered judgment against himself in full; and Holmes, J., after observing that the agreement in regard to the compromise had left the note in full force, and that the agreement was independent in character, said: "A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty."

13. In *Minor v. Walter*,³⁸ the plaintiff sued for goods sold, and the defendant replied that he had given credit for them in a prior suit brought by him against the plaintiff, in which he had got an *ex-parte* decree. The decree was held not to be *res judicata* on the ground that no person is bound to claim a set-off. Mr. Justice Wilde observed that "the defendant in the former suit was not bound to avail himself of the plaintiff's admission or confession of payment. He was not bound to prove the value of the goods at his own expense, when by bringing suit for them the expense would be thrown upon the opposite party. Such a rule as the present defendant contended for would often be productive of injustice. Suppose a case of mutual demands between A and B. A's demand against B, being \$ 20, and B's demand against A, \$ 30. If A sues B, and credits B's demand of \$ 30 at only 15, how upon the principles advanced by the defendant's counsel can B recover his balance of A? He can recover no balance in A's suit; and if judgment in that case is conclusive he can have no remedy." So also where a plaintiff gives a credit in his plaint, and the defendant confesses judgment, a subsequent suit for a cause identical in name with the credit allowed will not be barred, although the burden of showing that the credit in the first suit did not cover all his claim will be on the defendant.³⁹ But an *ex-parte* judgment upon an account in which the defendant is credited with the full amount of

Amount of credit given by plaintiff to defendant in accounts is not directly in issue in undefended suits for the balance.

certain items will bar a suit by him for the same items.¹⁰ Mr. Freeman lays down in general words that "no demand included in the plaintiff's complaint, or in the defendant's set-off or counter-claim, can be allowed if at any time before its allowance, but during the pendency of the action, it has been taken into account in forming a judgment in another action between the same parties,"¹¹ whether the action in which the judgment was entered commenced before or after the pending suit.¹²

44. As to the grounds of attack, there has been a still greater conflict of opinion, to a great extent on account of the forgetting or ignorance of the difference made in this respect by Roman jurists between the real and the personal actions. They were held to differ in this, "*quod cum eadem res ab eodem mihi debeatur, singulas actiones singulae causae sequuntur, nec alter earum alterius petitione vitatur; at cum in rem ago, non expressa causa ex qua rem meam esse dico, omnes causae una petitione apprehenduntur; neque enim amplius quam semel res mea esse potest, amplius autem deberi potest.*" This difference was itself due to the early forms of Roman procedure, on account of which it was an ordinary maxim of their jurisprudence, "*Dominium est causa proxima vindicationis; causa remota est traditio titulata vel ipse titulus.*" As a result of it, as pointed out by Lacombe, "*le rejet d'une action en revendication, elle ne pouvait plus être reproduite, alors même que le demandeur alléguât d'autres titres d'acquisition que ceux sur lesquels il avait formé sa demande, si toutefois ils étaient antérieurs à la première instance: nam quaecunque et undecunque dominium acquisitum habuerit, vindicatione prima in iudicium deduxit.*"¹³ This distinction appears to have been discarded in even those modern systems of jurisprudence that are derived directly from the Roman Law. Thus Lacombe says: "*L'ancienne procédure romaine distinguait entre les actions personnelles et les actions réelles, elle appliquait le second principe aux actions personnelles et le premier aux actions réelles. Cette différence a tendu de plus en plus à disparaître, et pour la législation française, c'est le second principe seul qui doit servir de règle, c'est-à-dire*

gac Richmond, 20 Am. Dec. 526
 Smeyers v. Hughes, 13 Mo. 87
 Abbott v. Stevens, 117 Mass. 340
 Bank of North America v. Wheeler, 71 Am.
 Dec. 693.
 Davis v. Hodges, 60 Ala. 367

Andrews v. Varrell, 40 N. H. 17
 Mc Givray v. Ivory, 70 Vt. 538
 42 Schuler v. Israel, 120 U. S. 706
 Estess v. Chicago, 72 Iowa 215
 43 Fr. Jud. 305.
 44 Law. Chanc. Judges, 110

*que la différence de cause entraîne toujours l'inapplicabilité de l'exception.*⁴⁵

In speaking of the law of the American Courts, Mr. Herman broadly says—"It is a settled principle that a party seeking to enforce a claim must present to the Court all the grounds upon which he expects a judgment in his favor. He is not at liberty to present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first should fail."⁴⁶ In England in *Hunter v. Stewart*,⁴⁷ the dismissal of a claim to be admitted as a shareholder in a company upon certain grounds was held not to bar a subsequent claim for the same relief on other grounds and equities that might have been relied upon in the former suit; and Lord Westbury, C., observed "that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might have been then brought forward; and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this position in civil suits, and no case was cited at the bar, nor have I been able to find any in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case giving rise to a different equity." This decision was explained in *Chinniya Mudali v. Venkata Chella Pillai*,⁴⁸ in which the other principal authorities were also commented upon, and it was held by the Madras High Court that the dismissal of a suit by a co-parcener for the entire joint estate sold by the other co-parcener, brought on the ground that the sale was void as made under undue influence and without plaintiff's consent, would not bar a suit by the same plaintiff for his share of the estate on the same grounds. Sir Colley Scotland, C.J., said: "I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated on in a suit, the bar of the judgment cannot be avoided by suing on a new form of claim, or on a ground of relief which might have been, but was not, raised or determined in the former suit, if such claim or ground arises out of and depends upon the same right or title as that which was directly in question in the former suit.

⁴⁵ Stark v. Stark 24 L. S. 485

⁴⁶ 11 L. J. Ch.
⁴⁷ 11 L. M. R. C. R.

The cases of *Hitchin v. Campbell*,⁴⁹ *Hadley v. Green*,⁵⁰ and *Henderson v. Henderson*,⁵¹ are distinct authorities on t' s point; and it is not weakened by anything expressed in the judgment in *Hunter v. Stewart*. . . . The observation of the Lord Chancellor as to the absence of authority for the position that the new case made by the bill ought not to be entertained as it was known to the plaintiff at the institution of the former suit and might then have been brought forward, is made strictly with reference to the case before him of 'a decree of dismissal of a former bill and a new suit asking the same relief, but stating a different case giving rise to a different equity.' So entirely different that (as the judgment points out) the evidence given in the second suit would not have been receivable in the first, and the dismissal did not include or imply the negative of a single disputed proposition which was necessary for the support of the second. This case, I think, affords no authority for the position that a decree in a former suit is not conclusive against a modified claim in a second suit raising the same question on a ground which might have been relied upon in the former suit. A decree in a suit by a person claiming as heir or co-parcener could be no bar to a second suit brought to try his right as donee or devisee of the same property, for the question of right would be different; unless the latter right appeared to have been in question in the first suit as in the case of *Udaiya Terar v. Katama Natchiar*.⁵² But a decree in a suit for partition of family property would, in the absence of special circumstances, be, I think, a bar to a second suit for relief on the grounds not before raised that the co-sharer or one of the co-sharers was illegitimate, or had been removed out of the family by adoption, or that part of the property was the self-acquisition of the plaintiff because it would be a second time litigating the question, of coparcenary right which was the immediate object-matter of the first suit." Holloway, J., likewise said that in *Udaiya Terar v. Katama Natchiar*, "I observed that there was no real conflict between *Henderson v. Henderson* and *Hunter v. Stewart*. Reading in its proper meaning, the passage at p. 115 (3 Hare), that meaning is simply that the

⁴⁹ H. R. 65.⁵⁰ 12 H. R. 100. R. 100. address
1757.

whole case of the parties as to the matter of litigation must be brought forward. Taking the word *matter of litigation* to mean *question of right* which is the only proper sense in questions of *res judicata*, there is no doubt of the perfect correctness of this opinion, and the Vice-Chancellor expressly says that the items of account brought forward by the bill were matters of which an account might have been taken in the suit. The matter of the litigation was 'what sum is due on the transactions between the parties,' and the judgment of the Court on that question was of course *res judicata* both as to items brought forward and as to items not brought forward. It was simply *Eastmure v. Lawes*²³ in equity, and the meaning of the rule is not that a decree will bar a man as to matters never raised, if they are matters relating to the external object of the litigation, but as to all matters which were relevant and examinable upon the question of right at issue between the parties. In *Hunter v. Stewart*, Lord Westbury very distinctly confines to the question of right raised the operation of *res judicata*. It was a very strong case, the relief was in substance the same, all the matters of fact alleged in the second bill were known to the plaintiff at the period of the first, but the exception did not apply because there was not 'the same ground of claim or one and the same cause for relief.' This is simply Von Savigny's '*same question of right*.' It is also a distinct repelling by the highest English authority of any such rule as has been supposed that, if any object-matter is brought into question, all possible claims thereto are necessarily offered for decision, and that a man is equally barred from any future suit whether he has submitted a particular ground of claim or not."

The decision in *Hunter v. Stewart* has been followed in several cases in this country. Among these, reference may here be made to the case of *Bhiso Shankar v. Ram Chandra Rao*,²⁴ in which Melvill, J., in delivering the judgment of the Bombay High Court said: "In the former suit the Courts might have laid down an issue as to title, and have determined that the plaintiff had no title, or that the defendant had a title to the land; but there was no such issue and no such decision, and the present suit cannot be held to be barred, unless it be held that a man

²³ 3 B. & S. C. 120

²⁴ VIII B. C. R. 4. C. 59

who brings a suit on one ground of action and fails, is necessarily debarred from bringing another suit for the same thing on another ground of action." The same was often held under the Code of 1859 also. Thus in *Aughore Nath v. Roop Chand*,⁵⁵ the dismissal of a suit on a bond for failure to prove its execution was held not to bar a subsequent suit to recover the identical sum as a balance due on a *khata* account. Nor was that view restricted to personal suits, or to suits for fungible objects. Thus in *Goorao Dutt v. Sooroo*,⁵⁶ the dismissal of a claim brought by the plaintiff as a certain person's heir was held not to bar a subsequent suit for the same property by the same plaintiff as the heir of a son of that person. In *Bhiso Shankar v. Ramchandra* also, a suit to recover certain land from defendant on the ground of his holding it as a trustee, was held to be not barred by a previous suit for the same land brought against him as a wrongful trespasser. And in *Shridar Vinayak v.* it was held that a failure in a suit of simple ejectment would not bar a subsequent suit for redemption, even when the defendant had pleaded the existence of the mortgage in the former suit; though the mortgage-deed which had not been stamped at the time of the execution, was not stamped and produced in evidence until the day on which the judgment was delivered. Mr. Justice West, in delivering the judgment of the Court in this case, observed that "the matter must be regarded as essentially different when it did not originate in the same transaction, and when it constitutes a wholly different right in the plaintiff giving rise to a different duty on the part of the defendant." The same view was taken by the Bombay High Court in *Haji Hasam Ibrahim v. Mancharam*,⁵⁷ in which also West, J., said: "There is not an allegation of a wholly different right or of a wholly different group of facts infringing it in this suit from what there was in the former one. The facts are connected in an essential jural unity, so that, had the plaintiff's whole case been brought forward before, it would not have involved separate investigations. This being so, we think that the plaintiff cannot now sue on the ground merely subsidiary to his main ground on which he seeks to re-open the litigation. Having striven to establish his title

⁵⁵ XIII W R 37
⁵⁶ XVI W R 24

⁵⁷ XII B H C R 224
 35 I L R 11 B L 16

to land by one means and failed, he cannot now establish that title by other means which were equally at his command when the former suit was tried, and so connected with the grounds on which he in that case relied that they ought to have been submitted for consideration together." In *Kunhi Kuttusu v. Kunhayan Kutti*,⁷⁷ likewise a suit for certain land on the ground of a sale by one's father was held not to bar a subsequent suit for that same land on the ground of heirship to one's father, Sir Walter Morgan, C. J., and Innes, J., observing that that was an entirely different ground of title to that put forward before. The Madras High Court has consistently held in a number of cases that a plaintiff was not bound to bring forward all his titles at once. Sir Charles Turner, C. J., and Forbes, J., in *Sadaya Pillai v. Chinai*,⁷⁸ said that the plaintiff "claimed the same property it is true, but he based his claim on inheritance—succession by survivorship to the interest of his united uncle; that claim was inquired into and determined. He now sues on the title created by the agreement made between him and the defendants through their guardian subsequently to the death of P. (his uncle). This claim has not been heard and determined." Innes and Muttusamy Ayyar, JJ., in *Thyila Kandi Ummatha v. Cheria Kunhamed*,⁷⁹ expressly dissented from the decisions of Calcutta High Court reported in I. L. R. II. Cal. 152⁸⁰, and in I. L. R. III. Cal. 23⁸¹, and in *Aikal Bapulli v. Kunhali*,⁸² observed as to the former that the entire *ratio decidendi* in the Privy Council case relied on by the majority of the Full Bench was, that a party must include in a suit every ground of claim arising out of the same cause of action, which was altogether different from the foundation on which the majority of the Full Bench based their judgment.

45. The contrary also appears to have been held in some cases, but chiefly on the ground that Sec. 2 of the Code of 1859 barred a subsequent suit on the same cause of action, and the decisions under that Code had reference to the identity of the cause of action, the question of the title, which at least, in real suits was not identical with it,

Conflict of opinion under the Civil Procedure Code of 1859 as to other titles being matters in issue

⁷⁷ I. L. R. II. Mad. 102.
⁷⁸ I. L. R. III. Mad. 102.
⁷⁹ I. L. R. IV. Mad. 105.

⁸⁰ 10 B.
⁸¹ 10 B.
⁸² 10 B.

having come into consideration, if at all, only incidentally. Thus the dismissal of a suit for certain land on the basis of a gift was held in *Brojo Lall v. Khettur Nath*⁵⁵ to bar a suit for the same land on the ground of heirship, as “a litigant cannot be allowed to keep back one of his titles, and then, years alter, to bring a fresh suit on the ground that he had still a right in reserve. He is bound to disclose all the titles at once.” Glover, J., further observed in this case, that “the Subordinate Judge appears to have confounded the plaintiff’s title, and his cause of action together, and to have considered that because the plaintiff’s title by inheritance was not decided by the judgment of 1864, it is open to trial now; but a plaintiff’s cause of action is a very different thing from his title; the one is something done contrary to a person’s interest which obliges him to seek the aid of a Court, the other is the proof that that something affords him a valid ground for relief.” In *Dudsar Bibee v. Shakir*,⁵⁶ the dismissal of a suit brought on the ground of a gift from plaintiff’s mother was held to bar a subsequent suit on the ground of inheritance; and Mitter, J., said: “It is perfectly clear that the title on which the plaintiff has brought the present suit was in existence at the time when the former suit was brought, and she was bound to bring the latter suit on all the titles that were then in existence. She did not choose to do so, and it follows, therefore, that the decision in the former case, so far as it relates to the ownership of the *Jote* must operate against her as an estoppel in this case. This principle has been applied by the Privy Council against a defendant, and I see no reason either in justice or equity why it should not be applied against a plaintiff. No special reason has been assigned by the present plaintiff to explain why she did not in the former case sue upon the title of inheritance now brought forward by her; and, in the absence of such an explanation, it would be obviously unjust and improper to harass the defendant by a second suit for the same property, merely because the plaintiff has now come forward upon a different title—a title which she could have and ought to have brought forward in the former suit without any difficulty whatever.” In *Premannud Ram v. Ram Churn*,⁵⁷ Kemp, J., in delivering the judgment of the High Court, said:—“The plaintiff was bound in his

⁵⁵ XII W. L. 50.⁵⁶ XV W. R. 105.⁵⁷ XX W. R. 452.

former suit to include in it all the grounds which then existed on which that suit could be based, and the second suit on grounds which existed at the time the first suit was brought cannot be allowed." So also in *Radhia v. Beni*,⁶⁸ a suit by plaintiffs as the heirs of J. for certain property from the daughter of R., alleging that it was the joint property of R. and J.; to which on R.'s death J. had succeeded, was held barred by a decision in her favour in a former suit brought against her by the same plaintiffs, after the death of J., for the same property on the allegation that it was the separate property of R., and the plaintiffs were entitled to it on the death of R.'s widow; the Court observing that,—“the judgment in that case appears to be final in respect of defendant's title as against the plaintiffs, whether they claim in that suit as heirs of R. or of J., for at that time any title they had as heirs of J. had already accrued, and the entire character of D.'s (the widow's) and defendant's title and possession as against them was opened out by the pleadings, and properly fell to be decided in that case, and cannot be raised again.” In *Pari Mal v. Vasanda Ram*,⁶⁹ a suit for the proprietary possession of a house having been dismissed, as barred by Limitation Law, on the ground of defendant's adverse possession, the plaintiff sued to redeem the house, alleging that his ancestor had mortgaged it to the defendant, and that suit was held to be not maintainable. “The plaintiff” said the Punjab Chief Court, “elected to bring his suit against the defendant for proprietary possession of the house in suit. He never mentioned a word about a mortgage. He sued to establish his right as proprietor and to obtain possession in virtue of that right alone. He might and ought to have preferred his action to redeem the house, he being the proprietor; or he might have sued to have his proprietary title declared and to redeem. The question of the mortgage was a question that existed, if at all, at the time the first suit was brought and determined, and it should then have been raised. He had an opportunity of bringing the question before the Court, and having omitted to do so he cannot now rest a new suit upon that ground.”

The leading decision on the point under the Code of 1859 was that of *Woomatara Debia v. Unnopoorna Dasi*,⁷⁰ which was a suit for certain land, on the ground that the plaintiffs

⁶⁸ L. R. I A. 50⁶⁹ 1877 P. R. No. 33⁷⁰ A. L. J. 125 P. C.

had been dispossessed of it on account of some proceedings in regard to disputes as to the boundaries of certain parcels of lands. The plaintiffs alleged that the land belonged to their ancient taluk, but the suit was held to be barred by a decision against them in a former suit in which they had claimed it on the ground of the same dispossession, but with the allegation that it was *taufir* land. In the High Court,⁷¹ Phear, J. (with the concurrence of Hobhouse, J.) said: "It is true that the title to possession on which the plaintiff now relies is different from that which she set up in the suit of 1854. But I think the difference in the title put forward does not change the cause of action within the meaning of Sec. 2 of Act VIII of 1859. The plaintiff's cause of action is simply this, that she is, as she alleges, wrongfully deprived by the defendants of the enjoyment by possession of certain land which she is entitled to have. It is for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title or her real title, so much the worse for her. The adjudication in the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint, by whatever title it might be capable of being then supported." On appeal their Lordships of the Privy Council concurred in that view with the observation that the principle on which their decision proceeded was almost identical with that laid down in *Katama Natchiar*,⁷² and said that the cause of action in both the suits was the dispossession of the appellant by the fixing of the boundary complained of, that the plaintiff's claim as *taufir* land was in effect an admission that it did not belong to her *taluk*, that "the Court of Appeal proceeding on the admission of the plaintiff that the whole of the originally settled *taluk* was in her possession, and that all she had been dispossessed of was claimed by her only as *taufir* lands, dealt with that claim; but it is perfectly clear that, if the plaintiff had chosen to put forward the other title, the Court would have dealt with the whole question and considered it." "Nor does it appear to their Lordships" it was further observed, "necessary to decide, whether in some of the cases put by Mr. Doyne, where the plaintiff

⁷¹ *Pode Umataya Dobi v. Krishnakamini Dasi*, [11 B. L. R. 400, 1902.]

⁷² IX M. I. A.

was suing entirely under a new and different title, such a distinction, as he contended for, might not be taken, because it seems to their Lordships that the matter in dispute throughout was the title of the *talukdar* of this *taluk* to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit that her right in any way to this land was capable of being therein determined. The Court in that suit, seems almost to have considered that the title now sued upon had been put forward and could not prevail and that if the *talukdar* had any title at all it was by way of *taqfir*." This decision was followed in *Kashee Kishore v. Kristo Chunder*,⁷² in which a suit for certain land on the ground of its being plaintiff's, as an accretion to the village L., was held barred by a decision against the plaintiff in a former suit in which he had claimed it as an accretion of village R. Sir Richard Couch in delivering the judgment of the Court, after observing that the plaintiff's title in both the suits was by accretion, and that the circumstance of its being an accretion to one village rather to another would be only the mode of acquiring the title, said, "whether it is by accretion to the one or the other, there is no difference in the title. . . . This (the Privy Council) judgment is conclusive that the plaintiffs in this case having the means in the former suit of proving the title by accretion to R. or by accretion to L., or by accretion to both, they are barred by the judgment in that suit, and cannot bring another setting up a title by accretion to L. If they did not (set up that title in the former suit), they ought to have done it, and having omitted to do it, they cannot do it now." All these cases were the real suits of the Roman Law, and the decision in them was based on grounds that were applicable to these suits. In this country, it has been attempted, however, in some cases, especially by the Calcutta High Court, to extend that principle to other suits also. Thus, professedly, on the authority of the same Privy Council decision, the majority of the Full Bench of Calcutta High Court held in *Denobundhoo v. Kristomonee*,⁷³ that a suit by a widow to establish her right to certain land as heiress of her daughter was barred by a decision against the widow

⁷² AIR W. R. 464⁷³ 11 F. R. 12.

in a former suit brought by her to recover it as her husband's heiress on the ground of the invalidity of a gift of it made by the husband to the daughter. The decision was expressly based on the ground that the difference in the title put forward did not change the cause of action within the meaning of Sec. 2 of the Civil Procedure Code of 1859. Sir Richard Garth, C. J., dissented from the view of the majority, and observed that the Privy Council decision was in a case, which might have been made the subject of an action of trespass in England, and in which the cause of action was dispossession, while the suit before the High Court came under a different class of suits, in which the plaintiff could not rely upon her possessory right, but was bound to show by what other right or title she claimed the land in dispute. "This is, in fact," said the learned Chief Justice, "one of those very cases, in which the question to be tried was not dispossession but of substantive title, and which their Lordships in the Privy Council especially except from the operation of their judgment." There can be no doubt, however, that there is nothing in the report of the Privy Council decision to show that, and "the report of the argument in the case does not," as was observed by Markby, J., "assist us in discovering what the class of cases is which is there referred to." "I think it is clear," went on the learned Judge "that by the words 'new and independent title' the Privy Council meant some title which could not have been put forward in the former suit. This must mean a title newly acquired, because it is clear that under our procedure a person may put forward in one and the same suit as many different titles as he likes." But it is equally true, notwithstanding what Markby, J., said to the contrary, as observed by Garth, C.J., that their Lordships did not intend to lay down any general rule, and notwithstanding the general concurrence expressed by their Lordships, which must be understood to have been a concurrence with reference to the facts of that case, that their Lordships did not intend to decide anything more in the case than was decided in the case of *Katama Natchiar*.

The Full Bench decision was followed, however, in *Bheeka Lall v. Bhuggoo Lal*, which was quite a suit *in personam*.⁷⁵ "The plaintiff," said Markby, J., in this case

⁷⁵ 1 L. R. III. Cal. 23.

“having been in partnership with the defendant brought this suit upon the ground that there was a partition, under which it was arranged that each should be entitled to a moiety of any decree which should be recovered, and he alleges that the moiety of a certain decree was recovered on the 4th September, 1871, and that, therefore, under that partition he was entitled to a moiety of the sum so recovered. The defendant answers that the plaintiff had already brought a suit in the year 1872, after this decree was recovered, in which he claimed, together with a number of other items, this very sum for which the present suit is brought. The plaintiff replies to that, that the former suit was not based upon any right which he had under the partition, but upon a general right to an account, alleging that the business continued subsequently to the partition, and he maintains that that suit was dismissed solely upon the ground that the Court found that, by the partition, the business was put an end to. That is true. But it is also clear that the plaintiff might, if he had chosen in that suit, have gone on to say that even if he was not entitled to a share in this decree as an item of the general account which he claimed, he still was entitled to it upon the terms of the partition itself, whether the business continued after the partition or not, and he did not choose to do so. Therefore, this is a suit in which the plaintiff having two rights under which he could recover this specific sum of money puts forward only one and claims upon that. And the question is, whether he could then put forward a claim for the same identical sum of money under any other right subsequent to that suit. I think that question is conclusively decided by the Full Bench in *Denobundhoo v. Kristomonee*. It is quite true that that decision relates to a claim to land. But every argument by which it can be maintained that if a man sues for land he is bound to put forward every title of which he was possessed at the time when the suit was brought, applies with equal force to a suit for money. I think it is impossible not to hold after that decision that if a man sues for a specific sum of money, he must put forward every right under which he claims at that time that sum of money.” Prinsep, J., also expressed himself to be of the same opinion. Both the learned Judges appear not to have adverted to the grounds of distinction, between the real and the personal action, which were relied upon by Roman

jurists in support of their views as to the difference in the nature of the cause in those actions and consequently in the operation as a *res judicata* of the judgments passed in them. As a general rule, it was considered that in suits for *des corps certains, l'individualite de l'objet dérive uniquement de l'individualite de la cause*; but in suits for *d'objets fongibles, deux instances ne peuvent pas avoir le même objet sans avoir la même cause, et réciproquement que, si les causes ne sont plus les mêmes, les objets diffèrent aussi*⁷⁶

In *Bemola Soondury v. Panchanun*,⁷⁷ the plaintiff intervened on the ground of his proprietary right to certain land in a suit against a tenant of that land for rent, but did not put forward his claim to the land based on the partition proceedings; and the claim for rent having been decreed, he brought a suit for the same land against the decree-holders, but it was held unsustainable; Kemp, J., observing that "as that (former) suit was instituted two years after the conclusion of the *butwara* (partition), any right to *khas* (actual) possession which the present plaintiff considered himself entitled to under the *butwara* should have been expressly set forth in that suit." In *Radhanath v. Land Mortgage Bank of India*,⁷⁸ however, a suit by a decree-holder for having certain property declared liable to attachment and sale in execution of a decree was held to be not barred by a decision against him in a former suit instituted by him for having the property declared liable to attachment and sale in execution of another decree. It was argued on the authority of the above decisions in this case, that the right claimed in the second suit having been in existence at the time of the first suit, the plaintiff ought to have included it in that suit, but the Division Bench expressed it as their opinion "that even the very strict interpretation put upon the decisions of the Judicial Committee by the Full Bench of this Court in the case of *Denobundhoo*, does not make the principle laid down applicable to this case, so that Sec. 2. of Act VIII of 1859 does not, in our view of the case, bar this suit." Mr. Justice Candy, expressed his concurrence with that decision in an exhaustive judgment in *Becharji v. Pujaji*,⁷⁹ observing that "this Court as well as the High Court at Madras is inclined to agree with Garth, C.J., rather than with the other Judges in *Denobundhoo* case."

⁷⁶ Lac. Code Juges 103.
⁷⁷ L. L. R. III. Cal. 705.

⁷⁸ L. L. R. VI. Cal. 550.
⁷⁹ L. L. R. XIV. Bom. 31.

46. The rule of *res judicata*, as enacted in the present Civil Procedure Code, omits all reference to the cause of action. The Explanation II, clearly enacts that it is matters which not only 'might,' but 'ought' to have been made ground of attack in the former suit, that shall be deemed to have been in issue in that suit. It is nowhere laid down what matters ought to be made a ground of attack in any suit. Sec. 45 of the Civil Procedure Code allowing several causes of action to be joined together is merely permissive. Sec. 42 is more comprehensive as requiring that "every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them." The words "as far as practicable" introduce into the section an indefiniteness and uncertainty, which though perhaps unavoidable, deteriorates a great deal from its value as a rule of law. The important question now in connection with this point will always be whether the ground on which the subsequent suit is based was such as ought to have been a ground of attack in a former suit. It appears to be generally agreed upon that a plaintiff, though "bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action, is not bound to put forward in one suit all his titles to the subject sued for, is not bound when several independent grounds of action are available to him, to unite them all in one suit." In *Muttu Chetti v. Muttan Chetti*,¹⁰ it was held by a majority of the Full Bench of Madras High Court that a suit on a bond would not be barred by the dismissal of a prior suit for the bond-money brought on the ground of a subsequent oral promise by the obligees to pay their proportionate shares of the amount due on the bond. Mr. Justice Kernan dissented from that judgment on the ground that the subsequent suit was "a claim for the same matter supported by or evidenced by a different means." Mr. Justice Innes, on the other hand, agreed with Sir Charles Turner and Mr. Justice Forbes, observing that it could not be "said within the meaning of the Explanation (II.) that the claim in the present suit upon the original agreement ought to have been made a ground of attack in the former suit," and that "in determining what ought to be or ought to have been a ground of attack in a suit, matters

must not be included which are not within the scope of it, i. e., which are not embraced within the same cause of action." Muttusawmy Ayyar, J., also was of the same opinion and said: "Reading the Explanation together with the rule enacted in Sec. 13, it relates, I think, to matters of fact or forms of relief referable to the cause of action in the former suit. Even supposing that it refers to all available grounds of action entitling the plaintiff to the relief then sued for, still I do not see how it can be applied to this case, in which the document (A) was alleged to have been superseded by the oral agreement. The two transactions could not co-exist and they could not simultaneously be made grounds of attack." In *Allunni v. Kunju Sha*,⁸¹ the dismissal of a claim brought by the *karnawan* of the defendants' *tarwad* for certain lands granted to them for maintenance under an agreement alleged to have been broken by the defendants mortgaging some of them, was held not to bar a subsequent suit for those same lands brought on the ground that he was entitled to resume possession thereof as *karnawan*; Mr. Justice Muttusami Ayyar observing "that Explanation II must be taken to refer to the title litigated in the former suit as contradistinguished from the relief claimed, and that where several independent grounds of action are available, a party is not bound to unite them all in one suit, though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action." Similarly, in *Sathappayyar v. Periasami*,⁸² the dismissal of a former suit for the defendant's removal from the office of Mahant on the ground of his not having been duly appointed by the zamindars, was held not to bar a subsequent suit for the same relief brought on the ground of the defendant being disqualified for that office as being a married man; Best, J., observing that "though this objection might have been taken in the former suit, he was not prepared to say that it *ought* to have been taken."

The High Court Allahabad, took a similar view in *Sheo Ratan Singh v. Sheo Sahai*,⁸³ in which the dismissal of a pre-emption claim by a reversioner in respect of certain land sold by the widow was held not to bar a subsequent suit for a declaration as to that sale not being binding on the plaintiff. Duthoit, J., in delivering the judgment of the High Court said: "Nor was the plaintiffs' presumptive title matter which might

⁸¹ I. L. R. VII Mad. 266.⁸² I. L. R. XIV. Mad. 1.⁸³ I. L. R. VI All. 150.

and ought to have been made the ground of attack in the former suit. The law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. A plaintiff may with the leave of the Court join causes of action; but he is nowhere compelled to do so. The cause of action in the present suit, although the date of its accrual is the same, is separate and distinct from the cause of action asserted in the former suit. To have made the title upon which they now come into Court the ground of attack in the former suit, would have been inconsistent with the object of the plaintiffs in that suit." So also the Bombay High Court in *Konerrar v. Gurrar*,⁸¹ held that the dismissal of a suit for a certain parcel of land alleged to have fallen to the plaintiff's share on a partition of a joint estate would not bar a subsequent suit for a general partition of that estate, Mr. Justice Melvill observing as follows: "It is possible that the plaintiff might, in his former suit, have made an alternative case, and have prayed that, if the Court should come to the conclusion that the title which he set up was a bad one, and that he was not entitled to the relief which he claimed, it should nevertheless award to him a different relief, founded upon a different and antagonistic cause of action. The plaintiff might, we say, possibly have been allowed to combine two such grounds of attack in one suit; but we cannot say that he ought to have done so. The injustice and inconvenience of insisting on such a procedure are very clearly pointed out by Garth, C.J., in his decision in *Denobundhoo v. Kristomonee*." A majority of the Full Bench of the High Court held the same in *Girdhar v. Dayabhai*,⁸² in which both the suits were for ejectment on the ground that the defendant was a tenant of plaintiff, but in the former suit a lease was relied upon and held disproved, and the subsequent suit was therefore based merely on the general relation arising from defendant's possession and payment of rent. Mr. Justice Melvill observing that this constituted a *difference*, not in the cause of action, but merely in the evidence by which the cause of action is supported, said: "The cause of action in the present suit, namely, the breach of an obligation arising out of the relation of landlord and tenant, was fully heard and determined in the former action; and that the present suit cannot be maintained, unless it can be held that a party who has failed in one action can bring another suit to establish the same case by different evidence."

⁸¹ I. L. R. V. Bom. 589.⁸² I. L. R. VIII. Bom. 174.

The Court held, however, that the cause of action and the specific right alleged in the two suits were different, and would have to be supported by different evidence, and West, J., said: "If, through the case being one between landlord and tenant, the several grounds were so connected as properly to admit of investigation and adjudication together, the District Judge ought to have dealt with them together, and determined whether on any view of the case before him the plaintiffs were entitled to a decree. If they were not so connected, it cannot be said that the former adjudication constitutes a *res judicata* for the purposes of the present case." In *Nilo Ramchandra v. Gorind Ballal*,⁸⁰ the dismissal of a suit brought for possession of certain land on an agreement was held not to bar a subsequent suit for the same land by the same plaintiff on his hereditary right as a member of the family, Sir Charles Sargent expressly observing that "the circumstances of the present case are certainly stronger than those which were held in *Girdhar v. Dayabhai* to prevent the bar of *res judicata*."

In *Becharji v. Pujaji*⁸¹ a suit for partition of a joint estate by a co-parcener as such had been dismissed as barred under Sec. 373 of the Civil Procedure Code on account of a former suit for partition by the plaintiff's father, which was withdrawn without liberty to bring a fresh suit, on the arbitrators having made an award which had been accepted by the parties, but did not alter their rights. In this latter suit the plaint did not refer to the award, but after the settlement of the issues, the plaintiff applied for an amendment of the plaint, so as to include in it his claim on the award, but the amendment was refused on the ground that it would materially alter the character of the suit. A Division Bench of the Bombay High Court held that the dismissal of the suit did not bar a subsequent suit for partition brought on the basis of the award; Candy, J., in an elaborate judgment reviewing the prior authorities, observed that though the plaintiff "might have framed that plaint (in the dismissed suit) to the effect that even if his general right to partition as a member of an undivided Hindu family was lost owing to the withdrawal of the suit of 1874, he was still entitled to partition by the agreement of the parties subsequent to the filing of the former suit (that was withdrawn), it does not follow that he ought." Mr. Justice Jardine further said—"It is true that the question referred to the Full Bench in *Denobundhoo's case*, and answered in

⁸⁰ I. L. R. X. Bom. 24.

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⁸¹ I. L. R. XIV. Bom.

the affirmative by the majority of the Judges, was framed in such a way as to lay down the proposition that a title to property not set up in a former plaint cannot under any circumstances be relied on in a subsequent suit to recover the same property. But the grounds of the decision, and the authorities quoted in support thereof, did not cover such a wide proposition, nor has such a strict interpretation of the law been approved of by the High Courts in this country." This decision and the decision in *Allunni v. Kunju Sha*⁸⁸ were followed by the Punjab Chief Court in *Muhammad Din v. Rahim Gul*,⁸⁹ Tremlett, J., observing that the words "matter which might and ought to have been made ground of attack," show that a plaintiff is not bound to assert at once all his titles to property, or to be estopped from hereafter advancing them. The same view had been taken by the Punjab Chief Court in the earlier case of *Syad Yar Khan v. Ram Chand*⁹⁰ in which the dismissal of a suit for land brought on the ground that it was not included in a conditional sale was held not to bar a subsequent suit brought for the same land on the ground that the conditional sale did not bind the estate after his death, and Barkley, J., observed that Explanation II was an explanation only of words used in Sec. 13, and Sec. 13 did not apply, "as though the plaintiff in the former suit might have made the invalidity of the alienation ground of attack, he did not in fact do so, and the question not having been raised in that suit, the matter cannot be said to have been heard and finally decided by the Court." The decision of the Punjab Chief Court in *Palamal v. Maya*⁹¹ is not against this view, as in that case the claim in the former suit was for T.'s estate on the ground of custom, and in the latter suit for the same estate on the ground of law; and Stogdon, J., in delivering the judgment of the Court expressed an approval of the decision in *Allunni v. Kunju Sha*, and said—"In the former case the right to inherit T.'s estate was the title which was made the ground of action. If plaintiffs were entitled to succeed to it both by law and custom, they were bound to make both law and custom grounds of attack. They were not entitled to bring one claim based on custom and a second one based on law." In *Kameswar Pershad v. Ruttan Koor*,⁹² A. mortgaged for her debts certain lands of her deceased husband's estate and afterwards surrendered the estate to R. on an agreement providing *inter alia* that he would pay off her

⁸⁸ I. L. R. VII, Mad 284
⁸⁹ 1898 P. R. No. 6
P. R. No. 24.

⁹¹ 1890 P. R. No. 146
⁹² L. B. XIX, I. A.

liabilities, and on a suit by the mortgagee for the mortgage amount against A. and R., the mortgage was held to be not binding against the estate, and after A.'s death, it was held that the decree against A. could not be executed against R. except in respect of personal property of A. which had come to his hands. The mortgagee then brought a suit against R. to have him declared liable on the ground of the agreement, but their Lordships of the Privy Council held that—"it was only an alternative way of seeking to impose a liability upon R., and the matter ought to have been made a ground of attack in the former suit, and therefore that it should be deemed to have been a matter directly and substantially in issue in the former suit."

47. The same principle of Explanation II, has been held to apply to the grounds that ought to have been urged by the plaintiff in reply to some plea raised by the defendant, as essentially such grounds are also grounds of attack. Thus in *Nirman Singh v. Phulman Singh*,⁹⁹

a suit by a minor contesting the validity of a mortgage of his share of lands was held barred by a decision in favour of the mortgagee in a previous suit against him, in which no objection was taken against the validity of the mortgage relied on by the mortgagee, and the decision of the Court proceeded on the hypothesis of its validity. In England the rule has been held to apply even to the grounds based on matters which arose after the plea pleaded by the defendant. Thus in *Newington v. Lery*,¹⁰⁰ Blackburn, J., observed that—"in the present case, by the non-payment of the instalment of the composition due on the 6th April 1869, the covenant not to sue came to an end before the confession of the plea, and might and ought to have been taken advantage of at the time. If the plaintiff could, after the 6th of April 1869, have replied the non-payment of the instalment due on that day, he ought to have done so; having missed his opportunity, he could not have done it afterwards."

48. The same rule would apply where the point was raised in the original Court, but left undecided by it, and not raised on appeal. Thus in *Sultan Ahmad v. Maula Lakhsh*,¹⁰¹ M. brought a suit to have it declared that the property attached in execution of a decree against her husband was hers and therefore not liable

⁹⁹ I L R IV, All. 65.

¹⁰⁰ L. R 6 C. P.

to attachment as her husband's, and on her death the suit was proceeded with in the name of her sons who claimed under her will. The Lower Courts decreed the claim on the ground that the property was hers, but her sons did not rely on the will in the High Court on appeal, and it was held that the judgment-debtor's fourth share in the property as her heir was liable to attachment and sale. This decision was held to bar a subsequent suit by M.'s sons against the purchaser of that share, on the ground that "the mother's will was plainly a matter which should have been made the ground of the defence in the course of the trial" in the High Court.

49. The principle of the Explanation II applies of course only to the grounds existing at the time of the former suit. Thus in *Nasratullah v. Mujibullah*,⁹⁶ Sir John Edge, C.J., and Knox, J., said,—“The (partition) decree of 1860 settled the rights of the parties as they were at that date and cannot now be questioned. But that decree cannot operate as *res judicata* on any question arising as to rights of the parties acquired since that date. As for instance, the defendants would be entitled to show that since that date they had obtained adverse possession, or that there was a partition in which no question of title was raised or other similar defences. When a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained.” This is the rule of the English Courts also. Thus in *Newington v. Levy*,⁹⁷ Blackburn, J., incidentally said:—“I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But if there be matter subsequent, which could not have been brought before the Court at the time, the party is not estopped from raising it.” Bramwell, B., in still clearer language observed that—“if new circumstances had arisen, a fresh action might have been brought. If, for example, the

⁹⁶ I. L. R. VIII. 200.

⁹⁷ L. R. CC. P. 140.

action were brought too soon, the debt claimed not being due at the time of the issuing of the writ, or if, as here there was a release operative at the time of plea pleaded, but defeasible by something which occurred subsequently, in these cases a confession of the plea, with judgment for the debt, would not be *res judicata* as to the matter subsequently arising." Kelly, C. B., broadly said:—"It appears to me to be quite clear that, upon this judgment having been obtained and acted upon by the parties, the claim of the plaintiff is completely answered and finally put an end to, unless there be a further defeasance of the release contained in the composition deed, by reason of a new default." Similarly in *Hentig v. Redden*,⁹⁸ Horton, C. J., said: "If H. had obtained a new and distinct title to the lots after the final judgment in the former action, then that judgment would not have been *res adjudicata* against her. But that is not this case. Under the finding of the trial Court, she obtained her new and distinct title to the lots pending the former action. It was not used in that action. It was too late to use this title after the final judgment in the former action." The Supreme Court of Iowa also held in *Reed v. Douglas*⁹⁹ that a title acquired by the defendant after issue joined, and which he does not plead by supplemental answer, must nevertheless be regarded as in issue, and therefore bound by the final judgment in the suit; Reed, J., having observed that, "it makes no difference that the conveyance was after the issue was joined, for under our system of pleading he would have been permitted to set up the claim, by proper amendment, at any time before the judgment was entered." The learned Editors of the American State Reports dissent from this decision as being "in conflict both with principle and with authority," and say: "The whole litigation takes effect as by relation as of the date of the filing of the complaint. While the parties in certain instances may give it a different effect or date by the filing of supplemental pleadings, it cannot be said to be their duty so to do. Hence the failure to file such pleadings is not a waiver of the right in some subsequent action of urging the matters which might have been urged by supplemental pleading in the former action. The utmost that a judgment can be properly regarded as determining is, that the facts alleged in the complaint were true when it was filed. If the defendant afterwards acquires a title from some one who

is not a party to the action, he may, at his election, put it in issue by a supplemental answer. But if he does not so put it in issue, it cannot be affected by the final judgment."¹⁰⁰ This view has to some extent been taken by the Supreme Court of California, which has held that where title was acquired long after the issue was joined in a former suit and the cause submitted for decision, and was not put in issue therein, it would not be affected by the judgment rendered in that suit.¹

The rule in France is the same. Thus Lacombe, speaking of the French Law, says:² *Que l'exception de la chose jugée n'est pas opposable lorsque depuis le jugement sont survenus des faits qui doivent avoir pour conséquence d'entraîner une solution différente de la première. Il est incontesté que lorsque les modifications, que se sont produites entre les deux instances, soit dans la position du demandeur, soit dans celle du défendeur, suffisent à expliquer la contradiction apparente des deux jugements, il n'y a pas violation de l'autorité de la chose jugée.* Mr. Herman, citing a number of American decisions,³ even observes that the bar of *res judicata* will not apply, where any party was prevented from raising any plea in the former suit by the wrongful act of the other party. There appears, however, to be no warrant for such a proposition in England or in British India, though the decision may, of course, be directly impeached on the ground of such wrongful act.

¹⁰⁰ 7 Am. St. Rep. 478.

¹ *Valentino v. Mahoney*, 37 Cal., 207.

² *People's Sav. Bank v. Holston*, 46 Cal., 95.

³ *People v. Holladay*, 27 Am. St. Rep. 186.

⁴ *People v. Holladay*, 27 Am. St. Rep. 186.

⁵ *United States v. Throckmorton*, 98 U. S. 61.

Pearce v. O'ney, 25 Conn. 544.

Wierich v. Dezoya, 7 Ill., 385.

Greene v. Greene, 61 Am. Dec. 454.

CHAPTER III.

MATTER IN ISSUE HEARD AND DECIDED.

50. A matter in issue in a former suit has merely as such no legal operation. To constitute *res judicata*, it must have been heard and finally decided. *Res judicata dicitur quæ finem controversiarum pronuntiatione judicis accepit, quod vel condemnatione vel absolute contingit.* In fact it is the decision that constitutes the bar in a subsequent suit. But the decision will not do that unless it is of a matter in issue, and even then it will be *res judicata* only in regard to that matter, or in regard to any suit in which that matter is directly in issue, and a decision of which suit therefore depends on the decision of that matter. A judgment of the dismissal of a suit cannot therefore be *res judicata* as to any matter not decided by it. Thus when a suit is dismissed under Sec. 102 of the Civil Procedure Code for the plaintiff's default in attendance, there is no matter decided; and such a dismissal has therefore been held in *Chand Kour v. Partap Singh*¹ not to constitute *res judicata*, though Sec. 103 may preclude the plaintiff from bringing a fresh suit in respect of the same cause of action.² The same has been held in *Radha Prasad Singh v. Lal Sahab Rai*,³ in which Lord Watson in delivering their Lordships' judgment said: "None of the questions either of fact or law, raised by the pleading of the parties, was heard or determined in 1881; and his decree dismissing the suit does not constitute *res judicata*. It must fall within one or other of the sections of Chapter VII of the Code. Assuming that the respondents are barred from seeking relief against the attachment and sale of their interest in Mahal U, the decree of 1881 does not disable them from claiming relief against the attachment and sale of their interest in any other property not included in the judicial sale of U." In *Muhammad Salim v. Nabian Bibi*,⁴ Mr. Justice Mahmood observed that "it is not every decree or judgment which will operate as *res judicata*, and that every dismissal of a suit does not necessarily bar a fresh action;" and said: "We have in the Civil Procedure Code itself the provisions in Secs. 43, 103, 244, 317, 371, 373, which, though barring an action *in limine*, must not be confounded with the

¹ 1 L. R. XV. 1 A. 156² See *Ramchandra Jayajir Khatal Mahomed*. 1 L. R. X. 600*Shankar Baksh v. Daya Shankar*, L. R. XV.

1 A. 66.

³ 1 L. R. XIII. All. 53.⁴ 1 L. R. VIII

rule of *res judicata* as enunciated in Sec. 13 of the Code. On the other hand, it is not every dismissal, though incorporated in a decree, that will operate in bar of a second action; and illustrations of this are to be found in Secs. 99 and 99A of the Code itself, which permit a fresh suit in express terms." So also Latham, J., observed in *Rungrao v. Sidhi Mahomed*,⁵ that "the Civil Procedure Code does not contemplate the dismissal of a suit by default under Sec. 102 as preventing the plaintiff by Sec. 13 from again litigating the same matter, as if so, the first sentence of Sec. 103 would be superfluous." It has sometimes been contended in France that as an *ex-parte* decree may operate as *res judicata* against the defendant, an order of dismissal by default, a *jugement de défaut-congé* should also be allowed a similar effect, but the contention has not prevailed, chiefly on account of the difference of their character, and of the circumstances in which they are passed. Thus Lacombe says:— *Le défendeur qui fait défaut ne doit être condamné que si les conclusions du demandeur se trouvent justes et bien vérifiées; quelle que soit en pratique l'inutilité de cette prescription, elle constitue une garantie telle quelle accordée par la loi à la partie qui ne se présente pas. Mais rien de tel n'est prescrit en ce qui concerne le défaut-congé; au contraire, d'après la règle du droit romain, "non solet quis absenti condemnari," dont les tribunaux ont fait de fréquentes applications, le juge commettrait un excès de pouvoir s'il vérifiait le fond du procès et le bien fondé des exceptions du défendeur, à plus forte raison encore s'il les repoussait. . . . Nous croyons donc que le défaut-congé doit rester sans influence sur le fond du droit.*" The principle that a decision is *res judicata* only in regard to a matter decided by it is of particular importance in countries in which the doctrine of bar by judgment is still distinguished from that of the conclusiveness of judgment, and not treated merely as a branch of the latter. The broad doctrine that a judgment in one suit can bar another suit on the same cause of action has, on account of that principle, to be qualified with the condition, that the judgment to have that effect must have been on the merits. The Indian Legislature in enacting the rule of bar by judgment in 1859, therefore, provided that a suit on a cause of action would be barred only if the said cause was heard and determined in a former suit. "It is not enough," said Sir Richard Couch, C. J., in delivering the judgment of the Calcutta High Court in *Pursun Gopal v. Poornanund*,⁷ "that

⁵ 11 J. R. VI Bom 482⁶ 10 Cal. Cases J. 1000 30⁷ 11 M. W. R. 272

the former suit has been heard and determined. The cause of action must have been heard and determined." In *Shokhee Rewa v. Mehdee Mundul*,⁸ Seton-Karr and Dwarkanath Mitter, JJ., held that the former suit not having been tried on the merits, the subsequent suit cannot be said to be on a cause of action heard and determined in a former suit.

In *Ramnath Roy v. Bhagbut*,⁹ the former suit had been dismissed on appeal on the ground that the plaintiff's authority to bring the suit was not proved; and Morgan, J., said that that judgment was inconclusive and no bar to the subsequent suit, "because it proceeded wholly on a technical defect or irregularity, and not upon the merits of the case." Shumboonath, J., further observed that the evidence of the payment of rent was not looked at by the Appellate Court, but that, "the plaint was dismissed for an irregularity, and notwithstanding this order of dismissal, the plaintiff is still authorised to bring another action for the same cause of action." In *Dullabh Jogi v. Narayan*,¹⁰ the former suit was dismissed on the ground of improper valuation, and Sir Richard Couch, C. J., said that it having "failed by reason only of an informality; it would be contrary to all principles of justice that the parties should be held to be conclusively barred thereby." In *Futteh Singh v. Luchmee Kooer*,¹¹ the dismissal of a suit for multifariousness was held not to bar a decision as to the real issues in the case; and Mr. Justice Phear in delivering the judgment of the Court said:—"We think, on referring to English authorities, that this dismissal of a suit for and on the cause of misjoinder or multifariousness is a disposing of the suit before hearing; and that the suit cannot, under those circumstances, be said to have been heard and determined. . . . It seems to be clear then that the objection to a suit on the ground of multifariousness or misjoinder of causes of action is an objection to the hearing of the suit; and if it prevails at whatever time, it has the effect of preventing a determination as after hearing. Now, under the Procedure Act of 1859, the Court would have done better, instead of dismissing the suit, to have simply rejected it. But the fact that the Court has in form passed a decree dismissing the suit does not alter the character of the determination." In *Pursun Gopal v. Poornanund*,¹² the dismissal of a suit on the ground of the misjoinder of parties was held not to be a decision

⁸ 1A W. R. 327.
⁹ 11L W. R. Act X. Rul. 140.
¹⁰ 1V E. H. C. R. 4 C 110.

¹¹ XIII E. L. R. Ap. 37.
¹² XXI W. R. 21

on the merits and therefore not to bar a subsequent suit on the same cause of action. The Calcutta High Court has also held that the dismissal of a suit as barred by Limitation Law,¹³ or on the ground of its being premature,¹⁴ or badly framed,¹⁵ or on account of non-payment of process-fee for summoning the legal representative of a deceased defendant,¹⁶ is not a decision on the merits, and therefore does not operate as *res judicata*. In *Putali v. Tulja*,¹⁷ a suit had been dismissed on the ground that the plaintiff had not obtained the certificate required by Sec. 6 of the Pensions Act 1871, and the dismissal was held not to bar a subsequent suit, Mr. Justice West, saying,—“When a suit has failed through a formal defect, and the merits have not been so pronounced on as to constitute a legal relation resting on the act of the Court, another suit is not, by the English law, barred. This rule is consonant to justice, and agrees with the law as set forth in the Code of Civil Procedure.” In *Rungrav v. Sidhi Mahomed*¹⁸ the former suit had been dismissed for plaintiff’s default in giving security for costs, and Latham, J., said:—“In *Hall v. Hall*,¹⁹ Sir James Hannen says—that it is well known that neither a non-suit at Common Law before the Rules made under the Judicature Act nor the dismissal of a bill before the hearing in Chancery was a bar to further proceedings. . . . No doubt the Court decides the suit in the pleadings of which such matter is alleged and denied, when it dismisses that suit for default on the plaintiff’s part, whether the default be non-appearance or failure to furnish security; but I do not think that the Court can properly be said to hear and decide the matter which it is relieved from hearing and deciding by the plaintiff’s default. . . . I rest my decision on the matter not having been heard and decided in the former suit.”

In *Bhukhandas v. Lallubhai*,²⁰ the former suit had been dismissed as against some of the defendants for want of jurisdiction over them, and in a subsequent suit against them in a competent Court, the order of dismissal was pleaded as *res judicata*. The plea was overruled however, Bayley, J., observing in the judgment of the Court that “there was no decision on the merits, and the proceedings against them in that Court were a nullity.” In *Muhammad Salim v. Nabian Bibi*,²¹ the

¹³ *Brindaban Chunder v. Dhununjy*, 1 L. R. V. Cal. 246.

¹⁴ *Kishor Babai v. Shree Narayan*, XVII. W. R. 301.

¹⁵ *Doodhar Singh v. Sowsuran*, 3 C. L. R. 305.

¹⁶ *Deodhar v. Murla*, 1 L. R. IX. Cal.

¹⁷ 1 L. R. III Bom.

¹⁸ 1 L. R. VI.

¹⁹ 27 W. R. (En)

²⁰ 1 L. R. XVI.

²¹ 1 L. R. VIII.

S. 51. DECISION ON PRELIMINARY POINT IS RES JUDICATA AS TO THAT POINT.

former suit had been dismissed on the ground of misjoinder and non-payment of additional Court fees, and the Allahabad High Court held, that that would not bar a fresh suit on the same cause of action; Mr. Justice Mahmood observing that the earlier decisions referred to above would apply under the present Code also. In fact, it is quite a generally admitted principle that when it can be gathered from the record of the former suit that the merits of the controversy were not passed upon, but the decision proceeded upon some technical objection not affecting the plaintiff's ultimate right to sue, the decision will not bar a subsequent suit. For instance, the American Courts also have repeatedly held that if a suit is dismissed for defect of pleadings,²² or of parties, or of a misconception of the form of proceedings, or for want of jurisdiction,²² or for default in giving security of costs,²³ or disposed of on any ground which does not go to the merits the order of dismissal or disposal will not be *res judicata*.²⁴ And where a party dealing with an agent brings a suit against him and principals jointly, and in consequence of a misnomer of the principals fails to secure a valid judgment against them, he is not thereby estopped from suing the said principals again.²⁵

51. In all these cases, however, the decision on the preliminary point on which the suit fails is *res judicata* in regard to that point itself in a subsequent suit. Thus Dr. Bigelow, citing a considerable number of American cases, says,²⁶—“If the decision was rendered upon a mere motion or a summary application, or if the cause was dismissed upon some preliminary ground, as upon a plea in abatement, *c. q.*, because the wrong forum or mode of suit had been resorted to, for want of jurisdiction, defect in the pleadings, misjoinder, non-joinder, non-appearance of the plaintiff, or the like, the parties are at liberty to raise the main issue again in any other form they choose,” but he admits that “a judgment upon a point not touching the merits of the principal matter in dispute, will in respect of that point ordinarily raise an estoppel.” Similarly Mr. Freeman observes that—“a judgment given because of a misjoinder or non-joinder of parties, plaintiff or defendant, or because of the want of capacity of a party plaintiff or defendant to sue or to be sued, establishes

²² *Wells v. Moore*, 49 Mo. 220.
²³ *Ex. Saxon v. Saxon*, 54 Ky. 17.
²⁴ *Bagley v. B. & R.*, 209.
²⁵ *Stone v. Fox*, 20 Rep. 35.

²⁶ *Hughes v. United St.*

nothing but such defect or incapacity, and cannot defeat a subsequent suit in which the vice causing the former judgment does not exist.²⁷ The dismissal of a suit on the ground that the plaintiff had no title at the time has often been held not to bar a subsequent suit after the perfection of the title.^{28 29} So also the dismissal of a suit by an assignee of a mortgagee on the ground of a defect in the assignment is held not to bar a subsequent suit brought after the assignment has been perfected.

It has been often held that the dismissal of a suit on the ground only of the plaintiff having mistaken his remedy or form of action,³⁰ or on the ground of any technical defect, irregularity or informality³¹ is not *res judicata* in regard to a subsequent suit in a *proper form*. So also, the dismissal of a suit on the ground that it is prematurely brought, the alleged demand not having yet become due, is held not to bar a subsequent suit for the same demand after it should fall due, and ripen into a cause of action.³² Where a suit fails only as to a part of the plaintiff's demand as being premature, the judgment will not bar a subsequent suit for that part after its accruing due.³³ The Indian High Courts have also taken the same view. In *Ramireddi v. Subbareddi*,³⁴ the dismissal of a suit brought by the assignee of a mortgagee on the ground that he had not given notice to the mortgagor, was held not to bar a suit by the same assignee after his giving notice. It may be observed, however, that the form in which the rule of *res judicata* is enacted in the present Code dispenses for the purposes of that rule with all distinction between a decision on a cause of action or on a preliminary point, as in both the cases a decision as to an issue will be a bar in regard to that issue, whatever bearing it may have had in the suit. Where a decree was obtained against A. as his brother's representative for land purchased from the brother, and an objection in execution of the decree against the delivery of its possession by A., on the ground that the land was his own and not his brother's, was disallowed as it had not been raised in the original suit, the order disallowing the application was held not to constitute

²⁷ *McCall v. Jones*, 72 A. n. 368.
²⁸ *St. John v. Anli*, 1 E. P. R. 62.
Worthington v. Merchants' Bank Co., 41 La. Ann. 1, 38 Am. St. Rep. 457, Levee Cotton Press Co. 1, 7 U. S. 614.

²⁹ *Worthington v. Banning*, 14 O. n. 328.
³⁰ *Ex. Jug.*, 181.

Blair, 44 N. Y. 445.
Ex. Holt, 28 N. H. 191.

Reg. v. Jones, 114 E. n. 515.
Johnston v. Norton, 67 E. 1, 1897.
North v. Sweetser, 12 A. 113.

Frederick v. Hooper, 3 N. E. R. 723.
Garrison v. Greenwich, 1 S. W. R. 441.
Oakes v. Matthews, 41 W. n. 327.
 1 E. R. 111.

res judicata, “because it could only do so if it had been tried as a suit under Sec. 331, Civil Procedure Code, and adjudicated upon which it was not.”⁷⁵

52. The same general rule is applicable, even when the decision is not on a preliminary point. Any matter, not decided, may be raised in a subsequent suit. Thus, where in a suit for rent at a certain rate, that rate was held not to have been proved, and a decree was given for the amount due at the rate admitted by defendant, without any finding in favor of that rate, the Calcutta High Court held in *Punnoo Singh v. Nirghin Singh*,⁷⁶ that the question as to the rate of rent could not be said to have been *decided*, so as to constitute *res judicata* in a subsequent suit. “It was one thing,” said Sir Richard Garth, C. J., in delivering the judgment of the Court in that case, “to adjudge that the plaintiffs should recover from the defendants as the rent for those years the sum which the defendant admitted to be due. It was another thing to adjudge that the sum so admitted by the defendants was the proper amount of rent.” In *Harry Behari v. Pargun*,⁷⁷ the decision in the former suit as to the rent for a certain year was held to be conclusive as to the rent payable for that year in a subsequent suit for another year’s rent, but only on the ground that the former decree could, in the peculiar circumstances, be construed so as to have decided the rate of rent. Pigot and Gordon, JJ., said—“We have been referred to the cases *Punnoo Singh v. Nirghin Singh*⁷⁸ and *Jeo Lal Singh v. Surfun*,⁷⁹ and it is urged upon us that where a plaintiff claims as rent a particular sum, and it is held by the Court that he has failed to establish that to be due, and the Court upon an admission by the defendant gives a decree for a lesser sum, that cannot operate under the rule of *res judicata* as determining conclusively the due amount payable for the year, the rent of which is sued for. That proposition is too large. It may or may not be *res judicata* according to what the Court actually finds. It may be discovered from an examination of the proceedings in the suit that all that was determined in it was that the plaintiff should recover from the defendants, as rent for the period in question, the sum admitted by them to be due; or it may be that what was decided was that the sum admitted by the defendants was the proper amount of rent payable for the land in suit for the year or years in question. That may be ascertained

⁷⁵ 11 L. R. 1.

⁷⁶ 11 L. R. XIX. 107, 65.

⁷⁷ 3 L. R. VII. 202.

⁷⁸ XI L. R. 450.

from a common sense view of the judgment by seeing what was decided." This decision has been followed in *Bakshi v. Nizam-uddin*,⁴⁰ on the ground that "the Judges in arriving at the conclusion at which they arrived, as to the amount of money due from the defendants to the plaintiffs, tried and decided the question judicially, what was the yearly rent at which the tenure was held by the defendants under the plaintiffs." In *Ram Gobind v. Mungur Ram*,⁴¹ the Subordinate Judge trying it expressed an opinion on one of the several points at issue in the suit, but that opinion was held not to constitute *res judicata*, as the suit was dismissed on the ground that it ought to have been instituted in the Court of a Munsiff.

The contrary has been argued in some cases on the ground that when an issue is or has to be raised in a certain suit, the dismissal of the suit on any ground involves a decision of that issue, and the plaintiff by submitting to the order of dismissal may be said to acquiesce in that decision. Mr. Nelson⁴² observes, with reference to the principle of such cases, that in them "the plaintiff should be held to have abandoned the ground or question of right not adjudicated upon, in that he did not make it a ground of appeal before the proper Court, and that, if the Court declines to consider a question of right before it, and dismisses the suit untried, the proper and only legal remedy is to appeal from the decree of dismissal." That also was the view taken with reference to Sec. 2 in *Ghasee Khan v. Kallu*,⁴³ in which a suit by the purchaser of a widow's rights in certain property for the separate possession of her share had been dismissed on the ground that the plaintiff must first establish the extent of his right and the validity of his purchase, and the subsequent suit brought for that purpose was held barred because "if the Court failed to decide all the matters before it, the remedy lay in an appeal and not in a second suit." So also in *Shah Newaz v. Mowaz*,⁴⁴ a decree for money due on a mortgage-bond, in spite of the mortgagee's plea of want of some of the consideration was held to bar a subsequent suit by the mortgagee for the recovery of the consideration, though it was admitted that the Court in the former suit made a mistake in not enquiring into the consideration.

As against that view, it is usually pointed out that the plaintiff is not bound to appeal against the dismissal even when

⁴⁰ 1 L. R. 22.

⁴¹ 11 M. P.

it is wrong, and that there is no warrant for holding that the decision on a preliminary or any other point is a decision on any issue which has expressly been left undecided. Their Lordships of the Privy Council have recently held in *Jagatjit Singh v. Sarabjit Singh*⁴⁵ that the dismissal of a suit, in which a certain claim is included, without any enquiry or finding as to that claim, does not bar a subsequent suit for that claim, and Lord Hobhouse in delivering their Lordships' judgment said: "Sec.

3 does not enact that no property comprised in a suit which is dismissed shall be the subject of further litigation between the parties. The moment land was shown to belong to Tappa S., it was considered as out of the suit. It seems to have been the express intention of both Courts to decide nothing about Tappa S."

53. On the same principle it is generally held, that when in a former suit a point was expressly left undecided, it cannot be held to have been decided in that suit,⁴⁶ and this is *a fortiori* so where the party raising it and pressing for its decision was referred to a separate suit.

Any matter expressly left undecided will not be deemed to have been decided.

In ordinary cases this would appear to be quite a truism. In *Mobaruck Hossein v. Sheo Gobind*,⁴⁷ and in *Sheoraj Nundun Singh v. Deo Nundun Singh*,⁴⁸ all the points in the former suit had been expressly reserved for determination in a future suit as between the parties to the subsequent suit, and the decision in the former suit was therefore held not to constitute *res judicata*. In *Ghursobhit v. Ramdutt*,⁴⁹ a suit for rent on the basis of an agreement was dismissed because the agreement was not proved, and without any finding as to the occupancy title on which the defendant relied. In a subsequent suit for ejectment, the defendant contended that on account of Explanation II. he was in regard to the question of title in the same position as if that point had then (in the former suit) been decided in his favor; but the contention was negatived, and Sir Richard Garth, C. J., said in the judgment of the Court that, "that explanation was intended to apply to a case where the defendant had a defence and a decree was passed against him because he did not raise that defence, and was never intended to enable a party to treat a point as having been decided in his favor in a former suit, which was in fact not so decided, and

⁴⁵ I. L. R. XIX
Dewan, 1904, P. R. No. 25.
XVIII W. R. 61.

⁴⁶ XXIV W. R. 23
⁴⁷ I. L. R. V. Cal. 2

which it was not necessary for the purposes of the suit to decide at all." In *Thyila Kandi Ummatha v. Kunhamed*,⁵⁰ the plaintiff had first sued for a *paramba*, alleging that it was hers and that she had let it to the defendant, but the Munsiff enquiring only about the letting, and considering it unproved, dismissed the claim. The plaintiff sued for it again, alleging the same title and letting, and Mr. Justice Innes and Mr. Justice Muttusamy Ayyar held, "that the question of title cannot be said to have been heard and determined in the former suit in which, though the question was originally in issue, the Judge excluded it from consideration and practically proceeded with the suit as though it was simply a suit to recover rent, on the footing that the relation of landlord and tenant subsisted between the parties." The Judges further observed that—"it has often been held that matters directly and substantially in issue have been heard and determined, although the judgment of the Court does not expressly allow or disallow them. In such a case the aggrieved party has his remedy in an appeal or an application for review; but, if he acquiesces in the judgment, the matter so put in issue must be regarded as having been decided when the judgment becomes final." This observation was a mere *obiter dictum* however, and no authorities were referred to in support of it. In the English and the American Courts also, when a bill in equity is dismissed without prejudice, the effect of the reservation is to prevent the decree from constituting a bar to another suit brought for the same subject-matter.⁵¹ The French Jurists also take the same view. Lacombe after referring to cases in which a suit may be and is decided on an examination of only one of the relations of right pleaded by the defendant, says:—
" Dans ce cas, les rapports de droit que le juge n'aura pas eu besoin d'examiner resteront au contraire intacts, et aucune des parties ne pourra à leur égard se prévaloir à l'encontre de l'autre de l'ité attribuée aux décisions judiciaires."

54. The real difficulty is experienced in those cases in which the decision of the point raised was necessary for the disposal of the suit, and the Court wrongly refused to decide the point. This was the case in *Emamooddeen v. Futteh Ali*,⁵² in which the former suit for possession against a person as sub-lessee was by the Original Court on the ground of the defendant

Same rule applies when the matter left undecided required to be decided for the decision of the suit.

having purchased the land from the intermedie holder, but the Lower Appellate Court gave a decree, and refusing to enquire into and determine the question of the purchase, referred the defendant to a separate suit on that ground. Jackson, J., in delivering the judgment of the High Court in the subsequent suit, said that, although the defendant was not well advised in omitting to appeal specially, yet neither the terms of Sec. 2, nor the general principles usually acted upon, absolutely precluded the hearing of the (subsequent) suit; and that as plaintiff had done all he could, "we ought not, in the interests of justice, to hold the plaintiff bound as by an estoppel." In *Kanai Lal v. Sashi Bhushan*,⁵⁷ Mr. Justice McDonell in delivering the judgment of the Calcutta High Court said:—"We think it impossible to say, that a question not only not decided in the previous suit, but in express language excluded from the decision therein, can be treated as a *res judicata*." In *Ram Charan v. Reazuddin*,⁵⁸ the Courts found themselves unable in the former suit, on account of error in the frame of the suit, to decide as to what lands the plaintiff was entitled to by virtue of his purchase, and therefore refrained from deciding that point, and left it to the plaintiff to bring a fresh suit framed in such a manner that the Court might be able to grant the relief sought. Sir Richard Garth, C.J., in delivering the judgment of a Division Bench in the subsequent suit, said:—"It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues upon the best evidence that the parties could adduce. But we are not prepared to say that the course taken by those Courts was *ultra vires*. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause; and it is clear that a question, which was advisedly left undecided in the former suit, cannot be said to have been heard and finally decided within the meaning of Sec. 13." In *Babu Lal v. Ishri Prasad*,⁵⁹ certain property hypothecated as security to M. was sold, at his instance, in satisfaction of his debt and purchased by him. The second mortgagee of the same property then sued the mortgagor and M. to have that property sold in satisfaction of his mortgage-debt, and got a decree which provided that "it would be competent to M. to sue to enforce his lien, and that, when he did so, the purchaser under the decree would have the option of discharging the first incumbrance," and the Full

⁵⁷ 1 L. R. VI. Cal. 751.⁵⁸ 1 L. R. X. Cal. 526.⁵⁹ 1 L. R. I. A. 2. 531.

Bench finally held that a subsequent suit by M. was not barred as the title asserted by M. in the subsequent suit was not disaffirmed, but rather declared in the first suit.

In *Becharji v. Pujaji*⁵⁶ the plaintiff had first sued for half a share of the undivided property as a coparcener, and on a private compromise effected between the parties, which did not make any substantial alteration in the plaintiff's right to partition as an undivided member of the family, the suit was withdrawn without any express permission as to a fresh suit. The plaintiff sued again for the same share as a coparcener without alleging the compromise, but the suit was dismissed as barred by the prior suit, the plaintiff's application to amend the plaint by inserting in it the compromise having been wrongly refused, and the High Court finally held that, that dismissal could not bar a subsequent suit for the same share on the basis of the compromise. Jardine, J., said that in *Ram Charan v. Reazuddin* and *Babu Lal v. Ishri Prasad* "the courts which had tried the first of the two suits under consideration had indeed suggested to plaintiff to bring a fresh suit, and the plaintiff's conduct in so doing rather than appealing was treated by the High Courts as reasonable submission to the Court. In the present case no such suggestion was made But, plaintiff's conduct in bringing the present suit on the compromise is much the same: and the above two cases are authorities for the position that in such circumstances the rule of *res judicata* cannot be applied with justice." Mr. Justice Candy, observed that in *Umatara Debi*⁵⁷ and *Denobundhoo*,⁵⁸ the plaintiff had refused in the former suit to put forward the title on which he relied in the second suit, and thereby prevented the Court from dealing with it, and said, "Refusal to bring forward a title is very different from omission to recite in the plaint. . . . Assuming that the cause of action in the present suit, even so far as it is based on the agreement of 1874, is the same as the cause of action in the suit based on a general right for partition, no law or authority hitherto accepted in this Court can be found for holding that, because Pujaji did not recite the agreement in his plaint of 1883, though it was brought forward in the proceedings and the Subordinate Judge expressly excluded it from adjudication. Pujaji's sons are now barred from suing on that agreement. To use the language of the judg-

⁵⁶ I. L. R. XIV. Bom. 31.

⁵⁷ II. B. L. R. A. C. 102.
⁵⁸ I. L. R. II. Cal. 155.

ment of this Court in *Kakaji Ranaji v. Bapuji* A it would certainly be strange and but little creditable to our system of procedure, if we were obliged to hold that the present action is barred by the former suit in which nothing was decided except that the present action was the remedy to which the plaintiff should resort." In *Avala v. Kuppu*⁶⁰ also, effect was given to a reservation, embodied in the decree, of a plaintiff's right of future suit as to a certain point which it was necessary to adjudicate upon for the decision of the case. In America, the Supreme Court of the United States in *Washington Packet Co. v. Sickles*,⁶¹ said that "even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

55. A reservation of any matter for disposal in a future suit is not as such binding on the court trying the subsequent suit. Thus in *Watson v. the Collector of Raj-Shahye*,⁶² the former suit was dismissed, because the evidence of the plaintiff's right to sue was not produced on the date fixed; but the decision was accompanied with a direction that the order was not intended to bar the plaintiffs from proceeding as if that action had not been brought. Notwithstanding the reservation, the High Court held the subsequent suit barred, and their Lordships took the same view on appeal. Sir J. W. Colvile, in delivering their Lordship's decision said—"We have not been referred to any case, nor are we aware of any authority which sanctions the exercise by the country Courts of India of that power which Courts of equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a non-suit, known in those courts. There is a proceeding in those courts called a non-suit, but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp; and to cases in which there has been an erroneous valuation of the subject of the suit It has been argued that that decree not having been appealed

⁶⁰ VIII B. H. C. R. A. C. 209.⁶¹ 1 F. R. VIII Masq. 77. | ⁶² 3 Wall. 502. | ⁶³ XIII M. L. A. 100.

against in the original suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively, that in no case could such a reservation be properly made by a judge in one of the Indian Courts, they think that it was open to the High Court to consider the propriety of the reservation." In *Mohan Lal v. Ram Dial*,⁵ a suit for recovery of a bond and for some money paid in excess of the amount due on it was dismissed on the ground that a certain amount due on the bond remained unpaid. On appeal by defendant the Lower Court held that a still larger sum was payable, but the High Court set aside that order on the ground that the defendant had no right of appeal from the original decree, as it was in his favor, expressing its regret "that if the parties are again obliged to come into Court the account must be taken again." A subsequent suit for fresh account was held barred however, the observations of the High Court in the former suit being treated as mere *obiter dicta*, which as observed by Straight J., could "have no force or effect to alter the legal rights and disabilities of the parties." Oldfield, J. further said—"Obviously those remarks cannot amount to a judicial determination that the accounts might be re-opened, for that was a point which could only be determined judicially at the hearing of any fresh suit which might be brought and by the Court deciding such suit." In *Sukh Lal v. Bhikhi*,⁶ such a reservation in a decree was treated by a Full Bench of the Allahabad High Court on a review of the prior decisions of the Court,⁷ as having been without jurisdiction and in excess of the powers vested in the Judges in India, and therefore a nullity. In that case, the plaintiff's claim to a third share of the land sued for in the former suit was considered proved; but the entire suit was dismissed, with a remark in the decree, that that order would not prevent the plaintiff from instituting a suit for the one-third; and a subsequent suit for that one-third was held barred by the former dismissal on the ground of *res judicata*. In *Udmi v. Neki*⁸ in the former suit the claim for redemption was dismissed on the ground that the plaintiff had no *locus standi* while the mortgagor's sons were alive. In the judg-

⁵ 1. L. R., II All. 843, F. R.

⁶ 1. L. R. XI All. 157.

⁷ *c. Kalka Prasad*, 1. L. R., V All.

135 All. W. N. 171

Mohammad Salim c. Naban Bibi, 1. L. R. VIII All. 252.

Kadirat c. Dina, 1. L. R., IX All. 155.

⁸ XV, F. R. 293

ment there was a remark that if the said sons did not claim redemption within three years, the plaintiff would be able to do that. A subsequent suit after three years was held barred on the ground of *res judicata*, but chiefly on the ground that the remark was not embodied in the decree, and was rather thrown out as a suggestion than recorded as a part of the final order in the case. This case was much like that of *Avala*, with the exception that in this the decree was not amended so as to embody the remark about the reservation as to the subsequent suit, as was done in *Avala's* case.

. It is not necessary to constitute a decision in a suit Decision to be *res judi-* *res judicata*, that evidence should have *catu* need not have been recorded in that suit and the decision passed on evidence. Thus it was often held that a decision under Sec. 148 of the Civil Procedure Code of 1859 would be *res judicata*. In *Mofizooddeen v. Amooddeen*,⁶⁷ the plaintiff failed to produce evidence on the date fixed, and there being nothing else to support his case, the Court dismissed the suit, and in a subsequent suit, Mr. Justice Ainslie finally held, that the Court which made the decree of dismissal “heard all that was laid before it by either party, determined the suit on the materials then before it, and made such a decree as is an estoppel under Sec. 2 of Act VIII. of 1859.” In *Venkatachalam v. Mahalakshamma*,⁶⁸ a decision under Sec. 148 of the Civil Procedure Code, 1859, was held to constitute *res judicata*, and Muttusami Ayyar and Parker, J.J., said—“The plea (of *res judicata*) no doubt ordinarily presupposes an adjudication on the merits as contradistinguished from an adjudication of which the effect consists in suspending the right of action until a certain event occurs or for some time. The counsel for the appellant overlooks the fact that there may be a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff. We are of opinion that Sec. 148 contained such direction. . . . The ground of decision under that section is not simply that there was default, but that there were no merits proved. . .

. . . It (the section) directed that the Court might proceed to decide the suit, notwithstanding the default, constituting thereby the decision on the imperfect material on the record into a decree on the merits which under Sec. 13 would bar a suit." The same has been held in regard to decisions under Sec. 158 of the Civil Procedure Code, 1877, the language of which is identically the same with that of the present Code. Thus in *Kartick Chandra v. Sridhar Mandal*⁶⁹ Mr. Justice Tottenham in delivering the decision of a Division Bench of the Calcutta High Court said,—“The plaintiffs having failed to adduce evidence, which it was incumbent upon them to do, the suit was dismissed; and must be held to have been dismissed on the merits.” In *Arunachala v. Panchanadam*,⁷⁰ Sir C. Turner, C. J., and Brandt, J., held that a decision under Sec. 158, Civil Procedure Code, 1877, as to a plaintiff not having been adopted, was *res judicata* in a subsequent suit against the next reversioner.* The rule is of a general application, and acted upon in other countries also. Thus in *Lyon v. Perin Manufacturing Co.*,⁷¹ the former suit had been dismissed on the merits without taking evidence, and the dismissal was held to constitute *res judicata*. In France also such decisions are distinguished from *les jugements avant-dire droit*, though the distinction appears to have been ignored in some early laws there. Speaking of them as really definitive, Lacombe says:—“*Telles sont celles qui condamnent une partie faute d'avoir produit une pièce ou fait une justification quelconque; ce n'est pas en effet une réserve du droit de produire la pièce ou de fournir la justification, c'est seulement le motif d'une condamnation définitif.*”⁷² But of course it is different with decisions that reserve the rights of parties, or se bornent à statuer quant à présent ou en l'état, and thus are like the judgments of non-suit in England.

* In *Shera Singh v. Khark Singh* (7) the decision in the former suit was held not to be final, yet that case is not an authority against the general rule, as though that decision seemed to have been passed under Sec. 158, it really decided nothing, and was regarded as to a mere rejection of the plaint. No issues had been framed, and even the statement was not recorded. The suit was simply summarily dismissed, the plaintiff instead of filing, as the Court had directed, an extract from the rent record relating to the particular lands claimed by him, had filed an extract relating to the whole holding, and the Court was thus unable to say what the really cla

57. A decision in a former suit in accordance with an award of the arbitrators, to whom the matter should have been referred, would be *res judicata*; ⁷² such an award having, as observed by Mr. Justice Bell in *Lloyd v. Barr* ⁷⁶, "the same legal effect as the verdict of a jury and judgment thereon under an issue strictly made up." The same was held in *Evans v. Kauphans*; ⁷⁷ and Mr. Herman speaking of the law of the American Courts says, that "a judgment on an award is to all intents exactly of the same force as a judgment on a verdict."⁷⁸ Dr. Bigelow in his work on Estoppel says,⁷⁹ "The award of arbitrators under an agreement which does not oust the jurisdiction of the courts, if final and regular, is conclusive upon the parties in respect of all questions properly brought before and considered by the arbitrators. . . . The awards of referees under appointment of the Courts, after the award has been entered as a judgment of courts, are binding, it seems, upon the same footing as ordinary judgments."⁸⁰ Mr. Herman says, "an award ordinarily has the force of a judgment and concludes the parties from litigating the matters submitted to the arbitrators, on any subsequent occasion; and when the submission is acquiesced in by both the parties, has as to them the effects of a final judgment."⁸¹ Their jurisdiction is an exclusive jurisdiction created by the parties, and it cannot be shown that they proceeded on a mistake, nor can the award be impeached at *nisi prius* for corruption. But it may be shown that the arbitrators have exceeded their jurisdiction, and adjudicated upon matters not submitted to them^{82, 83} Mr. Black says further that "if the award is made conditional upon a payment or performance, the condition must be fulfilled before the character of finality will attach. But otherwise it is conclusive whether performed or not."^{84 85}

58. The question in regard to the force as *res judicata* of a decision on a compromise or confession has not yet been judicially decided in this country, and there is a conflict of opinion about it in the English and the American Courts. The English Courts hold that as a

⁷² *Wazee Mahlon v. Chund Singh*, 1 L. R. VII Cal. 727.
⁷³ 11 P. 207.

⁷⁴ *Beal v. Conn*, 41 N. H. 40.
⁷⁵ 104 P. 67.
⁷⁶ 11 P. 207.

⁷⁷ *Pease v. Whitten*, 31 Maine 117.
Grant v. Pracht, 11 Kans. 64.
⁷⁸ *W. & A. v. L. & A.*, Ann.

⁷⁹ *Horn v. Corbett*, 527.
⁸⁰ *Evans v. Kauphans*, 12 S.
⁸¹ 11, July 1871.

general rule, such a decision does not operate as *res judicata*. Thus in *Jenkins v. Robertson*,⁸⁶ Lord Romilly said—" *Res judicata* by its very words means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. In my opinion, *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter." Mr. Black⁸⁷ also observes "that when a judgment or decree is rendered by consent, or is the result of compromise, it cannot be admitted under this description." In *Coucher v. Clayton*,⁸⁸ a judgment entered by confession, before the fixing of issues, was held not to be conclusive of the facts on which the plaintiff's claim was based; and Wood, V. C., said, that in the case of a compromise, "the defendants are supposed to say 'we thought it not worth our while to try the question, and we therefore did not raise the issue' They submitted and paid damages (for the infringement of a patent) and costs, possibly because they might have been unwilling to give over working or incur the expense of litigation."

An exception appears to be made in cases when a suit is dismissed on a compromise. Thus in *Kronprinz v. Kronprinz*,⁸⁹ and in *Bellocirn*,⁹⁰ the dismissal of a suit, on a compromise between the parties, was held to constitute *res judicata*. The American Courts usually take the same view even in cases in which a decree is given on a compromise or confession. Thus in *Chamberlain v. Preble*,⁹¹ the Massachusetts Supreme Court said, that it could make no difference, that the facts or some of them had been agreed to by the parties instead of being passed upon by the jury. In *Bank of Commonwealth v. Hopkins*,⁹² Chief Justice Robertson said, that it had frequently been decided in that Court that "the legal deduction from a judgment dismissing a suit agreed was that the parties had by their agreement adjusted the subject-matter of controversy, and that the legal effect of such a judgment was that it would operate as a bar to any other suit between the parties on the same cause of action." In *Gifford v. Thorn*,⁹³ the New Jersey Supreme Court said, that it was immaterial "whether the decree was obtained by consent or by a decision of the Court upon the points in controversy." The conclusiveness of a judgment upon the rights of the parties does in nowise depend upon its form or upon the

⁸⁶ 1 R. T. R. L. 177, Sc. 4p.

⁸⁷ 31 Jur. 843

⁸⁸ 11 Jur. N. S. 107

⁸⁹ 12 A. C. 236

⁹⁰ 10 P. D. 161, C. J.

⁹¹ 11 Allen, 370

⁹² 1

⁹³ 1

fact that the Court investigated or decided the legal principles involved. A judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the Court as a judgment upon demurrer or verdict. In *Fletcher v. Holmes*,⁹¹ it was even held, that a judgment would bind those on whose compromise it was passed, even though the pleadings would not have authorized it in a contested case. Mr. Black citing a number of American decisions lays down broadly that "a judgment entered upon confession without action is as conclusive as any other judgment, and is equally protected against collateral attack or impeachment"⁹²; and adds that "the majority of cases in this country hold that a judgment is none the less effective as a bar because its merits were determined in whole or in part, by the agreement of the parties."⁹⁷ "98 The view of the English Courts is also maintained by some of the Courts in the United States; and Mr. Black admits that "perhaps the estoppel created by such a judgment ought rather to be rested on the voluntary undertaking of the parties to abide by the result than on the strict principle of *res judicata*."⁹⁹ Even in this country, a finding on an issue as to title in accordance with Secs. 9 and 10 of the Indian Oaths Act 1873, has been held not to be *res judicata* in a subsequent suit. Thus in *Keshava v. Rudran*,¹⁰⁰ Sir Charles Turner, C. J., and Kindersley, J., said—"the terms of the Act indicate that the party consents to be bound only in respect of the subject-matter of the pending proceedings. A party may be willing to risk so much on the conscience of his opponent. He knows what, at the outside, his loss will be, but it would be unreasonable to suggest that he should bind himself further than is necessary for the decision of the pending suit, and as we have said, we don't understand that the law compels us to hold that he is bound to a greater extent."

59. A decision to constitute *res judicata* need not be specific and express, but merely by implication. In *Ramkrishna v. Vithal*, Mr. Justice Farran held, that a decree which necessarily involved a finding on an issue in the affirmative, even though there was

⁹¹ 27 Ind. 426.

⁹² North v. Mudge, 61 Am. Dec. 441.

Twogood v. Pease, 22 Iowa, 543.

Kirby v. Fitzgerald, 31 N. Y. 417.

Sechrist v. Zimmerman, 5 Pa. St. 446.

⁹⁸ Bl. Jud. 437.

R. v. C. v. D. v.

7. S. 261.

V. P. P. 20 La. Ann.

⁹⁹ Bl. Ind. 842.

¹⁰⁰ Bl. Jud. 611.

L. L. R. V. Mad. 270.

L. L. R. XV. Bom. 22.

no specific finding on it, would be *res judicata* as to that issue in a subsequent suit. In *Perkins v. Walker*,⁷ the action was for slander, in respect of the theft of a certain cloth. The defendant pleaded the truth of the slander, but a former decision against the defendant in a suit for that cloth was held to be conclusive both as to the title to the cloth and as to the plea of truth. In *Faught v. Faught*,⁸ a judgment establishing the dispositions of property under a will was held to establish the testator's capacity to make a will. In *Brady v. Huff*,⁹ a judgment for plaintiff in forcible entry and detainer was held to establish the plaintiff's previous possession. Dr. Bigelow says¹⁰ broadly that it is a well-established rule, "that every material fact involved in an issue must be regarded as determined by the final judgment in the action, so as not to be a subject of trial in any subsequent proceeding between the same parties." Mr. Herman citing *Ridgley v. Stillwell*,¹¹ no doubt observes, that the rule of *res judicata* does not apply to points that can only be argumentatively inferred from the decree. Indeed it was said even in the *Duchess of Kingston's case* that "a decision is not evidence of any matter to be inferred by argument from the judgment." But as pointed out by Dr. Bigelow,¹² "by the words 'matter to be inferred by argument from the judgment,' the Court clearly meant matter which was arguable, and not a certain and necessary inference from the judgment. Matter of the latter kind clearly is within a judgment . . . a former judgment or verdict is conclusive of all necessary inferences arising from it as well as of the matters actually in issue." Mr. Freeman also observes¹³ that "we may argue from a judgment, and if the argument is so cogent that a particular conclusion cannot be avoided without denying effect to the judgment or denying some premises essential to its support, then the judgment supports the conclusion beyond further controversy. If, on the other hand, the judgment merely tends to show that the existence or non-existence of a fact is highly probable or highly improbable, it is not conclusive respecting such existence."¹⁴ The Massachusetts Supreme

⁷ 10 Vt. 144.

⁸ 28 Ind. 470.

⁹ 75 Ala. 81.

¹⁰ Big. Katop. 97.

¹¹ 37 Mo. 128.

¹² Herm. Comm. 284.

¹³ Pray v. Hageman, 98 N. Y. 351.

¹⁴ 10 Fe. Jud. 47.

¹⁵ Sewall v. Robbins, 130 Mass. 104.

Trimble v. Fariss, 74 Ala. 290.

Koon v. Mallett, 68 Iowa, 205.

Wahle v. Wahle, 71 Ill. 510.

Court has expressly held that—"It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally conclusive with the conclusion. But such an inference must be inevitable, or it cannot be drawn."¹² In *Alison's case*¹³ Sir G. Mellish said that a judgment "is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered."

It has likewise been held in several cases,¹⁴ that "if a judgment necessarily determines a particular fact, that determination is conclusive, and requires the same fact to be determined in the same way in all subsequent actions between the same parties," and that a fact is necessarily determined to exist or not to exist, if its existence or non-existence is required to support the judgment rendered." The Alabama Supreme Court has held in a number of cases,¹⁵ that to be a bar, it must appear that the fact claimed to have been decided "was essential to the finding of the former verdict." In *Hass v. Taylor*,¹⁶ the Court said, "it is only of those matters which as premises, enter into and uphold the judgment (the judgment being the conclusion of the syllogism), and connected, qualifying matters, which, if produced, would change or impair the legal force and effect of the cause of action itself on which the judgment was rendered, that the judgment pronounced becomes conclusive." This was cited with approval in *Liddell v. Chidester*,¹⁷ in which a decree in a prior suit for the balance of a month's wages was held to bar a contention as to the engagement of service being an annual one; Stone, C. J., observing that "it was indispensable to plaintiff's right of recovery (in the former suit) to show that by the terms of the contract his wages were due in monthly instalments, one instalment of which had matured." The same principle has been recognized in other States also. In *Washington Packet Co. v. Sickles*,¹⁸ the Supreme Court of the United States said: "If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter,

¹² *Berlin v. Shannon*, 96 Am. Dec. 733.

Lee v. Lee, 97 Am. Dec. 773.

¹³ L. R. 9 Qb. Ap. 25.

¹⁴ *Duncan v. Bancroft*, 110 Mass. 207.

Dorris v. Erwin, 191 Pa. St. 220.

Boel District v. Stocker, 42 N. J. L. 116.

¹⁵ *Chamberlain v. Gaillard*, 26 Ala. 504.

Gilbreath v. Jones, 66 Ala. 120.

McCall v. Jones, 72 Ala. 309.

Hatchey v. Cooksey, 81 Ala. 142.

¹⁶ 61 Ala. 420.

¹⁷ 3 Am. St. Rep. 347.

¹⁸ 6 Wall. 302.

it will be considered as having settled that matter as to all future actions between the parties." This decision was cited with approval in *Haines v. Flinn*.¹⁹ Thus if a party is entitled to property only by virtue of its devise to him, a decree distributing it to him is conclusive of the devise and its validity.²⁰ In *Langendyck v. Burhams*,²¹ it was held that a decree for possession of a property would in a subsequent suit between the parties for the recovery of its profits be *res judicata* as to the plaintiff's right to recover possession, and therefore also of the right to recover the profits, except when this latter right should be contested on some ground supervening subsequent to the decree for possession, as, for instance, on the ground that the defendant did not continue to be in the possession of the property.²² But a mere affirmation in general terms in a suit of the plaintiff's rights based in some measure upon certain documents, will not be conclusive of the genuineness of those documents in a subsequent suit, when their genuineness was not put in issue in the first suit. This principle has been recognized in a number of cases in the New York State.²³ It is certainly not sufficient that the judgment should contain merely a finding which may have some bearing upon a point in issue, or some observations applicable to such an issue, which do not directly determine it, and, as observed by Sir Richard Couch, C. J., in delivering the judgment of a Division Bench in *Shib Nath v. Nubo Kishen*,²⁴ "any opinion which he (the Judge) may have incidentally expressed cannot be considered a finding upon the issue, so as to make his judgment in the former suit a determination of the cause of action in the present suit."

Nor does the effect of a judgment depend upon the reasons given for it, or upon the circumstance that any were or were not given.²⁵ In *Aukhil Chunder v. Shib Narain*,²⁶

¹⁹ In *Mahomed Momin v. Lutafut Hossein*,²⁷ Loch, J., in delivering the judgment of a Division Bench of Calcutta High Court, observed that "no opinion which may have been expressed in the judgment of the Lower Court (adverse to the defendant) in the case which is now before us, and which has been altogether dismissed, can affect the defendant's rights in any future litigation which may arise between the parties." This was, however, a mere *obiter dictum*, the point actually decided being that the defendant cannot appeal against a judgment of dismissal of the suit, even when the judgment contains some opinions adverse to the defendant.

¹⁹ 19 Am. St. Rep. 1.

²⁰ *Greenwood v. Murry*, 28 Minn.

²¹ 11 Johns, 461.

²² *Miller v. Henry*, 84 Pa. St. 31.

²³ *People v. Johnson*, 97 Am. Dec. 770.

Balden v. State, 103 N. Y. 1.

Hynes v. Estey, 13 Am. St. Rep. 421.

²⁴ XXI. W. R. 189.

²⁵ *Herm. Comm.* 101.

²⁶ XV. W. R. 527.

²⁷ XIII. W. R. 239.

Norman, O. C. J., in delivering the judgment of another Division Bench, observed that "no part of the reasoning on the findings of fact which have induced the Court to come to its decision are binding as between the parties further than for the purposes of the particular decision." The point actually decided in this case was, however, simply that where a claim for enhanced rent for a certain year was dismissed on the ground that the defendant was not liable to pay enhanced rent for that year, but the Judge also expressed an opinion that the tenure was not protected from enhancement, that opinion would not be *res judicata* in a subsequent suit for enhanced rent for another year. Mr. Freeman says:—"In ascertaining whether a particular matter has become *res judicata*, the reasoning of the Court is less to be regarded than the judgment itself, and the premises which its existence necessarily affirms."²⁸ "²⁹ Nor will the reasoning and opinion of the Court upon the subject, on the evidence adduced before it, have the force and effect of a thing adjudged, unless the subject-matter be definitely disposed of by the judgment."³⁰

60. A decision may operate as *res judicata* even though it is not embodied in the decree; and the judgment in a suit is often looked at to discover what issues were decided in the suit and in what way. Decision on a matter may be *res judicata* even when not embodied in the decree.

On general principles, Savigny appears to have maintained the contrary and to have affirmed as a general maxim,—*l'autorité de la chose jugée ne s'attache qu'au dispositif du jugement*. The correctness of this maxim has, however, been strongly denied by a number of Jurists, who contend that the doctrine of *res judicata* with such a limitation will not satisfy the social requirements for which the doctrine was established. Lacombe says,—*les auteurs et les tribunaux qui ont proclamé en principe cette restriction n'auraient jamais pu l'appliquer rigoureusement à la pratique, et qu'ils ont dû, tout en la maintenant en théorie, y apporter dans l'application des dérogations sous le nombre et l'importance desquelles elle disparaît presque complètement.* . . .

Aussi n'y a-t-il point d'auteurs qui ne reconnaissent qu'il faut consulter soit les motifs, soit même les autres éléments du

²⁸ La. Ann. 34.
v. Perrot, 19 La. 319.

²⁹ Fr. Jud.
³⁰ Flak v. Parker, 14 La. Ann.

*jugements et de la procédure, pour préciser la pensée du juge, lorsqu'elle ne ressort pas d'une manière assez distincte du dispositif seul, et c'est ce qu'ils expriment en disant que les motifs, quoique n'ayant pas l'autorité de la chose jugée, doivent être consultés pour l'interprétation du dispositif.*³¹ After referring to several cases in which a suit may be decided on different grounds, and bar a different subsequent suit in each case according to the ground on which the decision was actually based, and pointing out that the *dipositif* gives only the result, and not the ground of the decision, Lacombe continues:—“ *C'est donc aux motifs que l'on attribue dans certains cas l'autorité de la chose jugée. Mais pourquoi alors poser un principe théorique et le démentir à chaque pas dans la pratique ? Pourquoi énoncer une règle et se donner le plaisir de la détruire ensuite pièce à pièce. Et, ce qui est plus grave, où s'arrêter dans cette série de derogations apportées à la règle posée, et comment distinguer ceux des motifs auxquels l'on doit attribuer l'autorité de la chose jugée et ceux auxquels l'on doit la dénier Or, tous les points que les juges auront ainsi dû décider, c'est-à-dire l'existence ou la dénégation de chaque rapport de droit, et la légitimité des conséquences qui en sont déduites, jouiront également de l'autorité de la chose jugée; que l'opinion du juge se trouve exprimée dans les motifs ou dans le dispositif, qu'elle ne résulte même que par déduction implicite, mais nécessaire, du contenu du jugement, peu importe.*”³²

There is no rule in England or India requiring that the findings on all the issues in a suit must be embodied in the decree, and, in fact, it will under the present practice be wrong to frame a decree so as to embody them in it. And the Courts have in both the countries taken the same view of the binding character of the decisions on the issues in a suit that are not embodied in the decree. Thus Pearson, J., considered it as decided in *Robinson v. Duleep Singh*,³³ “ what really needed no decision at all,

¹ In *Robinson v. Duleep Singh*, Lord Justice James said:—“ The learned Judge (Fry, J.), was inaccurate in thinking that he was bound to look or that he was entitled to look at the issues, without regard to the pleadings or the order directing the issues, without regard to the mode in which the decree afterwards dealt with them. The issues are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right; and what determines the right between the parties is the decree, and in order to determine what the decree really decides it is essential to see what were the rights which were in dispute between the parties and which were alleged between them. . . . It appears to me that it was absolutely essential in order to arrive at the meaning of the issues to ascertain the meaning of the findings of the jury as they were understood and accepted by the Court which directed the jury to enquire into them.”

that if a decree of the Court is capable of more than one construction; you must, in order to ascertain what is the proper construction, look at the pleadings in the action to discover what was the issue which the Court intended to decide.³⁴ In *Houstoun v. Sligo*,³⁵ the same Judge looked at the pleadings in another suit to ascertain whether the issues in that suit were the same as those in the suit before him.

In India, even prior to the Civil Procedure Code of 1877, it was held directly in *Enaetoollah v. Ameer Buksh*,³⁶ that a decision on an issue in a suit in order to constitute *res judicata*, need not have been embodied in the decree in that suit, Markby, J., pointing out that their Lordships of the Privy Council when they delivered their judgment in the case of *Soorjomonee Dayee*,³⁷ had not the decree before them, and neither in that case nor in *Krishna Behary Roy*³⁸ considered it necessary to look at the decree. Under the present Code, the majority of a Full Bench of Allahabad High Court held in *Jamait-un-nissa v. Lutfunnissa*,³⁹ that "it is the former decree explained by the light of the pleadings, which must be looked at in order to determine whether the plea in bar is a good or a bad one;" and there was nothing against that view in even the dissentient judgment, which turned on another point. Their Lordships of the Privy Council have held the same repeatedly. Sir Richard Couch, in delivering their Lordships' judgment in *Kali Krishna Tagore v. Secretary of State for India*,⁴⁰ said:—"In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree is only to state the relief granted, or other determination of the suit. The determination may be on various grounds; but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided." Referring to that decision, Riwaz, J., in delivering the judgment of the Full Bench of the Punjab Chief Court in *Narain Das v. Faiz Shah*,⁴¹ said:—"We feel no difficulty in holding that a decision on an issue may be final . . . and *res judicata*, though not expressly embodied in the decree." And not only the judgment, but even the proceedings in the former suit may

— In re May, 25 Ch. D. 236.
³⁴ 29 Ch. D. 446.
³⁵ XXV. W. R. 283.
³⁶ XII. B. L. R. 204.

³⁷ I. R. II I. A. —
³⁸ I. L. R., VII All. 611.
³⁹ L. R. 15 I. A.
⁴⁰ 1899 P. R. No.

also be looked at. This has been expressly recognized in *Hurry Behari v. Pargun*⁴² and a host of other cases; and recently, in *Ramireddi v. Subbareddi*⁴³ Sir Arthur Collins, C. J., and Wilkinson, J., quoted the observations of Sir Richard Couch with approval.* Lord Hobhouse also in delivering the decision of their Lordships of the Privy Council in the recent case of *Jagatjit Singh v. Sarabjit Singh*,⁴⁴ speaking of the doctrine of *res judicata*, observed "that when a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided. The decision in *Indarjit Prasad v. Richha Rai*,⁴⁵ is not against that view. In that case, the decree gave the plaintiff an unrestricted right to the property claimed by him, but in the judgment on which that decree was based, it was stated (the finding apparently not being a finding on any material issue in the suit) that the defendants were entitled to certain rights in respect of the property decreed to the plaintiff. Sir John Edge, C. J., and Knox, J., said "that decree as it stands is a decree unlimited as to the now defendant's possessory right and title, and it appears to us that when there is an apparent conflict between a decree which is specific and clear in its terms and a statement of fact in the judgment upon which that decree was based, which, if material, was inconsistent with the decree, we must pay attention to the decree as it stands in preference to the statement of facts. . . . The decree and not the statement in the judgment must be taken on matters which are material to the final determination of the Court on the subject; otherwise you might have a man lawfully in possession under a decree declaring his title to possession and you might have his opponent still entitled by reason of a statement in the judgment on which that decree was passed to question the title of the man in possession." But the learned Judges expressly admitted that they had "no doubt that in every case where the application of Sec. 13 is in question it is

* In *Narasamma v. Kanaya*,⁴⁶ Innes and Muttusami Ayyar, JJ., said that the words 'finally decided' "apply not to the expression of opinion in the judgment, but to what has been decided by the decree," but the opinion thus expressed was not necessary for the decree, and what was decided was that an appeal would not lie against it, and that an apprehension of its operating as *res judicata* in a subsequent suit was not right.

⁴² I. L. R., XIX. Cal. 636.
⁴³ I. L. R. XII. Mad. 500.
⁴⁴ L. R. XVIII. I. A. 178.

⁴⁵ I. L. R. XV. All. 3.
⁴⁶ I. L. R. IV. Mad. 134.

not only necessary to look at the decree but at the judgment. . . . There are also cases in which the decree possibly alone could not be understood without an examination of the pleadings, of the issues and of the judgment." There was no reference, however, to the pleadings in *Kachar Ala Chela v. Oghadbhai*,⁴⁷ in which a decree was given for mesne profits up to the date of the suit at Rs. 700 per annum, and also for the period of the pendency of the suit. In execution-proceedings taken for the determination of the amount of the latter, the defendant claimed deductions on account of the Government assessment and local cess paid by him and also on account of *Vero* and *Kharajat* payments. The District Judge was of opinion that to investigate those questions would be to go behind the decree, and held that the mesne profits from the date of the suit must also be determined at Rs. 700 per annum. But the High Court held the contrary, and Sir Charles Sargent in delivering the judgment of the Court observed, that "it cannot be said that that was determined by the decree. The defendant's case on that point would have afforded no proper defence to the suit as a suit in ejectment The details of the item of Rs. 700 allowed by the Court as the annual mesne profits of the lands, are not set forth in the judgment of the Court, and it is, therefore, impossible to say that the right to this particular deduction claimed by the defendant was adjudicated on by the Court."

61. In England and the United States of 'America, according to the best and recent authorities, it is quite settled that "extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel."⁴⁸ It is admitted that "parol evidence is not admissible to enlarge the estoppel beyond the limits of those points or questions which, from the face of the pleadings, might have become the vital issue in the former trial,"⁴⁹ nor to contradict the averments

⁴⁷ L. L. R. XVII. Bom. 35.⁴⁸ Bl. Jud. 749.⁴⁹ Bl. Jud. 742.

of the record of that trial, though the averments may be explained when ambiguous and made specific when general, but only in cases in which there were a number of issues, the finding on any of which would warrant the judgment, to show that the finding was upon one rather than another of those different issues.⁵⁰ This is usually justified on the ground of the admission, under the modern systems of pleading and procedure, of general declarations and general pleas, from which it can seldom appear what was the exact matter in issue that was adjudicated upon in the former suit. It is said "the modern mode of declaring in most general use is to insert several general counts, and when in such case the general issue is pleaded, a vast variety of different claims may be put in issue and tried When such a judgment is pleaded in bar, it seems to be liberal enough, and going as far in support of a judgment as experience will warrant, to consider it as *prima facie* evidence of a prior adjudication of every demand which might have been drawn into controversy under it, leaving it, like other *prima facie* evidence, to be encountered and controlled by any other competent evidence tending to show that any particular demand was not offered or considered."⁵¹

The Indian Civil Procedure Code expressly enacts that a distinct finding shall be recorded on every issue, and the question of the admissibility of extrinsic evidence can arise here only when a Court does not comply with law, and records only a general finding. The question as to whether extrinsic evidence will be admissible here in such a case appears not to have come yet before the Courts; and there is certainly no authoritative ruling on it. The real difficulty that can arise in such cases is only as to the construction to be placed on the general finding. And there is a conflict as to that even in the United States, where naturally such cases are more frequent, and where the question arises in connection with the *onus probandi* as to the adjudication in the former suit. It has been held in several well-considered cases, that when a case is submitted to a jury, involving two or more issues, with evidence tending to sustain them all, and a general verdict is returned, such verdict is *prima facie* evidence that all the issues were found in favor of the prevailing

⁵⁰ *Hickerson v. City of Mexico*, 20 Mo. 61.

| ⁵¹ *Bridge v. Gray*, 25 Am. Dec. 348.

party.⁵² But this doctrine is opposed to some of the best authorities in the books,⁵³ according to which, "if it appears from the record that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined."⁵⁴ It was thus held in *Rogers v. Ratcliff*⁵⁵ that a verdict upon a fact put in issue by a special plea was not conclusively determined, when there was by the same verdict a finding for the defendant upon the general issue; as the latter finding found the fact that the plaintiff had no cause of action and consequently it was unnecessary to investigate the matter of the special plea.

Dr. Bigelow says, "where a decision presents two objections, and is sustained generally, one of the grounds being a preliminary defect and the other going to the merits of the case, it is held that it will be presumed that the decision rested upon the former ground Still, where an answer in equity sets up various matters in defence, some going to the merits of the case and others not, and there is a general decree of dismissal, the decree will not bar another action for the same demand because of the uncertainty whether it was rendered on the merits, unless the uncertainty were entirely removed by evidence."⁵⁶ In *Sheldon v. Edwards*,⁵⁷ the Court admitting the rule that the dismissal of a suit on a preliminary point before reaching the merits is no bar to another suit, said: "An action is brought upon a draft before the days of grace have expired. The defendant answers: first, that the draft is usurious; second, that it was paid; third, that it was premature. The defendant being entitled to grace, the Court found such issue for the defendant, and the judgment was accordingly entered. Can any Court assume to say that the judgment was given upon one issue more than upon another, when the record shows it was given alike upon all? Can it be denied that each of these issues was tried and adjudged? What Court then can detract from the power or force of the consequences flowing from such

White v. Simonds, 75 Am. Dec. 620.
Day v. Vallette, 97 Am. Dec. 333.
Rockwell v. Langley, 19 Pa. St. 402.
⁵³ *Russell v. Place*, 94 U. S. 606.
Sawyer v. Woodbury, 66 Am. Dec.

Christman v. Harman, Am.
⁵⁴ Bl. Jnd. 756.
⁵⁵ 3 Jones, 225.
⁵⁶ Big. Estop. 57.
⁵⁷ 35 N. Y. 266.

judgment upon the issues? It is stated that estoppels must be mutual; that if these issues upon the merits had been found the other way, and the complaint dismissed because the action was prematurely brought, there would have been no estoppel against the defendant from trying them again if another action was brought. This seems plausible, but I think unsound. It is the judgment upon the findings that makes the estoppel. If the judgment be one of non-suit, or in the nature of a non-suit, and the action be dismissed, nothing whatever is adjudged in respect to a subsequent suit. It is no bar to anything; an action is brought on a draft, and the plaintiff, after evidence on both sides, is non-suited, judgment of non-suit entered and paid. The next day he brings the same action again and succeeds; the former, of course, being no bar. But suppose, instead of a non-suit, the judgment had been for the defendant upon the merits because he failed to prove the defendant's handwriting, it is equally clear that the judgment would have been binding and a bar, whether it was founded on the finding of a Court or referee or the verdict of a jury."

62. To constitute *res judicata*, the decision must have been final, a term which admits of a variety of significations. In regard to its most ordinary meaning, Mr. Freeman after observing that no question becomes *res judicata* until it is settled by a final judgment, says, "For this reason, the verdict of a jury, the finding of a court, or the report of a referee or master is not admissible as evidence to create an estoppel, before it has received the sanction of the Court, by passing into a judgment."⁵⁸ ⁵⁹ And in the United States the general rule is that a verdict or other finding not followed by judgment is not binding,⁶⁰ and though doubts used to be entertained about it in England, the rule there now appears to be the same.⁶¹ Dr. Bigelow in his treatise on the Law of Estoppel says, "A preliminary decree or judgment, or a decision upon a motion in the course of a trial, cannot ordinarily result, if the case go no further, in precluding the parties from drawing the matter into issue again. The case must have gone to a complete termination, so that nothing

⁵⁸ *Nash v. Hunt*, 116 Mass.
McReady v. Rogers, 93 Am. Dec.
Holbert, 87 Cal. 287.
⁵⁹ *Pr. Jud.* 467.

⁶⁰ *Hawks v. Trusdell*, 60 Mass. 557.
Wadsworth v. Connell, 104 Ill. 300.
⁶¹ *Brow. Estop.* 100; *Ever. Estop.* 26.

more is necessary, for the purpose of the suit, to settle the rights of the parties or the extent of those rights."⁶² Mr. Herman says that "a judgment or decree requiring the defendant to pay damages is not the less final because it requires some future order of the court to carry it into effect, although the amount of the recovery is uncertain, the nature of the judgment is definite and certain, and the amount will become certain by reference."⁶³

In *Kelley v. Stanbery*,⁶⁴ the Supreme Court said: "Because a final decree might direct that certain facts should be ascertained in execution of such decree, it will not make it interlocutory; nor, on the other hand, because the decree finds the general equities of the cause, and reference is had to a master to ascertain facts preparatory to final disposition, will it be regarded as final." This was quoted with approval in *Arnold v. Sinclair*⁶⁵ by DeWitt, J., who further said: "In all the many cases that we have examined we find the general tendency to be as laid down in the Ohio case,—that if the matters and things to be ascertained after the entry of the judgment are for the purpose of carrying that judgment into execution, then such judgment is final. . . . We find it remarked in several New York cases that although further proceedings before the master are necessary to carry the decree into effect, yet if all the consequential directions depending upon the result of the proceedings are given in the decree, it is final. Some future orders of the Court may be necessary to carry it into effect. We are aware of the condition of the California decisions in this matter. *Crowther v. Rowlandson*⁶⁶ was an action to declare certain instruments void. Findings were made, and the case was referred to a master to state an account. In the opinion appears a *dictum* to the effect that the trial was not complete until the report of the referee was filed. This *dictum* is quoted and treated as a decision in *Hinds v. Gage*,⁶⁶ and *Duff v. Duff*.⁶⁷ We do not understand that it can be laid down as a general principle that a trial is incomplete, and hence a judgment is not final, simply because a reference is had for some purpose; that is to say, the fact of a reference being had after judgment does not in itself determine that the judgment is not final. Nor do we think that the California cases intend to so hold, although in some of the cases from that court the principle is announced so

⁶² Big. Estop. 14

⁶³ Herm. Comm. 61.

⁶⁴ 12 Ohio. 409.

⁶⁵ 20 Am. St. Rep. 409.

⁶⁶ 27 Cal.

⁶⁷ 56 Cal.

⁶⁸ 71 Cal.

generally and without qualification that the reader may be led to conclude that the court intended to announce that the fact of a reference after judgment in itself determined the non-final character of the judgment. But the case of *Clark v. Dunnam*⁶⁸ following *Jones v. Clark*,⁶⁹ and the later cases, especially *Sharon v. Sharon*,⁷⁰ bring the principle nearer to what we believe is the correct rule, as we have indicated above. A reference after judgment does not, *per se*, determine the character of the judgment as to its finality. It may be final, or it may be an interlocutory order, depending upon its facts. If the reference be for the purpose of executing the judgment only, after the judgment has finally determined all the rights of the parties, then the judgment is final."

The New York Supreme Court in *Webb v. Buckelen*⁷¹ said, "Until final judgment is reached the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. An interlocutory order is not such a judgment. It is not a judgment at all." The word 'final' is often used as opposed to interlocutory: a judgment being called final when it is such as entitles the party to obtain at once the fruits of it, without any further enquiry being requisite as to its amount; and interlocutory when something remains to be done in the suit before the successful party is entitled to issue execution upon it. Interlocutory orders do not "have the force of *res judicata* for the reason that they do not dispose of or terminate the cause."⁷² A judgment has been said to be final when it constitutes an award of judicial consequences which the law attaches to facts, and which determines the subject-matter of the controversy between the parties.⁷³ In the rule as enacted in India, the term does not appear to denote complete or conclusive, or to be used in contrast with the term interlocutory as above explained, because here a decision on an issue howsoever final, is often incapable of execution, and will sometimes be so even after the suit is quite finished."

r. As instances of decisions that are not final, mention was made in Bill III of Act X of 1877, of a decision when it has been obtained by arrangement between the parties, and the Court has not given a judicial opinion in the matter, and of

(1) an interlocutory order that a party shall account.

a decree passed by a subordinate Court contingent upon the opinion of the High Court, were omitted with all others, apparently as not

Pothier in speaking of the Roman rule, contrasts definitive judgments with the provisional, and observes that “a provisional condemnation cannot have either the name or the authority of *res judicata*, for although it gives the party obtaining it a right to compel the opposite party to pay or deliver provisionally the money or things demanded, it does not put an end to the cause, or form a presumption *juris de jure* that what is ordered to be paid or delivered is due, since the party condemned may be admitted in the principal case to prove that what he was ordered to pay was not due, and consequently to obtain a reversal of the judgment.” The character of a final decision usually designated as *définitif* in France, has received a very full discussion in that country, especially in contrast with *les jugements avant dire-droit*—comprising *les provisoires, préparatoires et interlocutoires*—and *les comminatoires*, to which, all the effect of *res judicata* is not allowed. Pothier lays down generally “*que pour qu’un jugement ait l’autorité de la chose jugée, il faut que ce soit un jugement définitif qui contienne ou une condamnation ou un congé de demande*.” This description has been condemned as too narrow, as judgments relating to *la compétence* certainly operate as *res judicata* though they do not comprise *ni condamnation ni congé de demande*. Lacombe says:—*Un jugement est définitif quand il décide d’une manière absolue soit le litige, soit certains points du litige.*⁷⁴ This *per se* is indefinite, but he distinguishes a *définitif* judgment from provisional judgments, observing that the latter are those by which the Judge “*ordonne une mesure ou règle la position respective des parties et des objects litigieux, mais dans l’intention que sa sentence n’ait d’effet que jusqu’à la décision définitive sur le fond, qui n’est d’ailleurs préjugé au aucune manière*.” Provisional judgments may be executed and appealed against, but they do not constitute *res judicata* because they are essentially temporary and liable to an alteration by the Judge with every change of circumstances, and to deprive the Judge of that power will be to destroy the very object of provisional orders.—“*La même raison qui leur permet de prononcer provisoirement les autorise aussi à rapporter et la modifier leur jugement, et . . . nous dirions que non-seulement les nouvelles circonstances qui peuvent s’être produites, mais le seul fait de l’écoulement d’un certain*

les deux instance au provisoire, constitue une cause nouvelle, en égard au caractère de ces décisions, et empêche par suite qu'il n'y ait lieu à l'exception de chose jugée. As to the preparatory and interlocutory decisions, Lacombe says:— *ils ont les uns et les autres pour résultat commun de retarder le jugement du fond, afin de compléter l'instruction de l'affaire ; mais le caractère essentiel des jugements interlocutoires est de préjuger le fond. Il en résulte que la nature préparatoire ou interlocutoire d'une disposition ou d'un jugement dépend souvent de circonstances extrinsèques, telles que la position respective des parties, leurs conclusions, l'état du litige. Nous citerons comme constituant généralement des jugements préparatoires ceux qui nomment un commissaire, ordonnent une instruction par écrit, une comparation personnelle, ou un interrogatoire sur faits et articles. Au contraire, sont généralement interlocutoires les jugements qui ordonnent une enquête, ou enfin tous ceux qui admettent les parties à faire, par les voies qu'ils indiquent, la preuve de faits qui, supposés constants, auraient une influence importante sur l'issue du procès.*" As to the preparatory judgments they constitute *moins des jugements, que des actes de procédure*; elles restent donc à la libre disposition du juge, qui peut les modifier ou les retracter ainsi qu'il avisera dans l'intérêt de la bonne conduite de l'instruction. There has been greater difficulty in regard to interlocutory judgments, as they also *pre juger le fond*; and Lacombe says: "*Le juge n'est pas tenu de décider dans le sens du préjugé de l'interlocutoire, et il peut baser sa sentence sur des motifs pris d'ailleurs, sans avoir égard à la preuve fournie.*" L'interlocutoire est ordonné pour le juge et non pour la partie, en faveur de laquelle il ne peut par suite constituer un droit acquis. Les *Comminatoires* are judgments by which a party is ordered to do something within a certain time and in case of default to lose all or some of his rights or to pay certain damages. The *cour la cassation* has decided that such decisions are not binding on the Judge but may be altered by him, and he may extend the time or diminish the damages payable, and to make them *definitif*, il faudrait que, par une seconde sentence la partie fût déclarée déchue de ses droits. They should be distinguished, however, from conditional decisions, which are *règlement définitif*, et si litige est reporté devant le juge, sa mission se bornera à constater si la condition est arrivée ou défaillie. It thus appears that the

essential distinction of *definitif* judgments was in France based on exactly the same distinction of procedure, the non-existence of the power to alter them, as has been adopted by the Indian Legislature.

63. Explanation IV enacts that a decision is final, when the Court making it cannot alter or reconsider it, except on review. An *Ex-parte* decision may become final. *ex-parte* decision will therefore not be final, at least so long as an application may be made to set it aside.⁷⁶ That an *ex-parte* decision can be altered on the application of the defendant, otherwise than on review, cannot be doubted, as the word 'review' must, in this Explanation, be understood to have the same sense in which it is used in Part VIII of the Civil Procedure Code; and this will be, apparently, sufficient against its finality for the purposes of the rule of *res judicata* before the expiry of the period prescribed for an application for its alteration. In the case cited, Cunningham, J., said:— "As the alleged execution was held to be fraudulent, and no proceedings had been had which gave finality to the decree, we think that the Lower Appellate Court was right in holding that, in the absence of any proof of execution, the defendant was not precluded by the existence of the decree from contesting a question with which it dealt." In *Bhugirath v. Ram Lochun*,⁷⁷ an *ex-parte* decree was held not to be binding, the Court expressly observing that it had not been stated that the *ex-parte* decree had ever been executed so as to have become final. In *Modhusudun Shaha v. Brae*,⁷⁸ a Full Bench of the High Court expressly declined to express an opinion as to "whether an *ex-parte* decree operates so as to render any question decided by the decree *res judicata* in the absence of proof that such decree was executed." The Full Bench said, however, that "neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such

⁷⁶ The learned Judge pointed out that this decision was not in conflict with that in *Birchunder Manickya v. Harriah Chunder*,⁷⁹ the question in which related only to the value as evidence of an *ex-parte* decree. Sir Richard Garth, C. J., said in the judgment of a Division Bench in that case, "a decree obtained *ex-parte* is, in the absence of fraud or irregularity, as binding, for all purposes, as a decree in a contested suit. If it were not so, a defendant in a rent-suit might always by not appearing, and allowing judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definitive judgment as to what is the proper amount of rent due from him to his landlord."

⁷⁷ Nil Money Singh v. Heera Lall Dass, I. L. R. VII. Cal. 23.
⁷⁸ I. L. R. VIII. Cal. 275.

⁷⁹ I. L. R. XVII. Cal. 3.
⁸⁰ I. L. R. III. Cal. 222.

a case so as to make that matter a *res judicata*; assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case." It was not considered in any of these cases whether a decision to be final for the rule of *res judicata* must not be so *ab initio* and *per se*, and not merely such as may become so after the lapse of an indefinite period and by the aid of another enactment. The Courts appear to have tacitly adopted the latter view, as an *ex-parte* decree has been treated as *res judicata* in numerous cases, without any question being raised as to its finality, and it may be presumed, that it had, or was deemed to have, become final.

64. There has been, on general principles, a greater conflict in regard to the effect as *res judicata* of a decision liable to appeal. Mr. Justice Holloway pointed out in his judgment in *Kakarlapudi Suriyanarayana Rao v. Cheluri*¹⁰⁰ that according to the English Law, a judgment did not cease to be conclusive because an appeal was pending from it,¹⁰¹ though the contrary was held by some continental jurists.¹⁰² Some of the American Courts also have held that a decision is final until reversed, set aside or vacated,¹⁰³ and that the defendant if sued again on the original cause of action during the pendency of the appeal, may plead a former recovery in bar.¹⁰⁴ This view is opposed however to a settled course of decisions in which it is held that the pendency of an appeal suspends the operation of the judgment in regard to all its usual effects; and the judgment, not being final while the appeal remains undetermined, cannot be pleaded in bar in the interval nor used in evidence as an estoppel.¹⁰⁵ It has even been expressly held that an appeal vacates and annuls the judgment, and

*uri*¹⁰⁰ that according to the English Law, a judgment did not cease to be conclusive because an appeal was pending from it,¹⁰¹ though the contrary was held by some continental jurists.¹⁰² Some of the American Courts also have held that a decision is final until reversed, set aside or vacated,¹⁰³ and that the defendant if sued again on the original cause of action during the pendency of the appeal, may plead a former recovery in bar.¹⁰⁴ This view is opposed however to a settled course of decisions in which it is held that the pendency of an appeal suspends the operation of the judgment in regard to all its usual effects; and the judgment, not being final while the appeal remains undetermined, cannot be pleaded in bar in the interval nor used in evidence as an estoppel.¹⁰⁵ It has even been expressly held that an appeal vacates and annuls the judgment, and

¹⁰⁰ In *Doe v. Wright*, a writ of error from the judgment pleaded as an estoppel was pending in the House of Lords; and Mr. Cresswell contended at the bar that, "until actual reversal, the judgment is in full force. If it be reversed, the plea of course becomes false, and the estoppel fails; but in the meantime the possibility of reversal cannot affect the present validity of the judgment." The Court of King's Bench accepted that contention, Lord Denman, C. J., observing that the authority cited by Mr. Cresswell from the Year-
18 Ed. 4, f. 6, B. pl. 33, is very direct and satisfactory, and to this, and other cases, the bar, may be added those of *Tanwell v. Stone*,¹⁰¹ *Beauwell v.*

¹⁰⁰ V M. H. C. R., 176

¹⁰¹ *Doe v. Wright*, 10 A. and E. 763.

¹⁰² *Unger Ost. Priv. Recht*, II, 603.

Bay. Sys. VI, 197, seq.

Walster II, 340.

¹⁰³ *Vide*, *Horn. Comm.* 39, 40, 42.

Ellis v. Clarke, 70 Am. Dec. 603.

Tadlock v. Keeles, 73 Am. Dec. 213.

Nill v. Compant, 79 Am. Dec. 411.

v. Hovey, 19 Am. Rep. 308.

v. Slagle, 89 Ind. 325.

1, 15 Or. 464

¹⁰⁴ *Clond v. Wiley*, 29 Ark. 80.

Thompson v. Griffin, 6 S. W. R 410.

Sarge v. Harpending, 40 Barb. 166.

Burton v. Burton, 26 Ind. 342.

¹⁰⁵ *Haynes v. Ordway*, 52 N. H. 284.

Ketchum v. Thatcher, 12 Mo. Ap. 185.

Byrne v. Prather, 14 La. Ann. 638.

Senter v. Raymore, 47 Am. Dec. 515.

State v. McIntire, 60 Am. Dec.

¹⁰⁶ 4 Burr. 245.

¹⁰⁷ 3 T. R. 643.

thereafter there is no existing judgment which will conclude the parties as a matter of evidence or which can be relied upon as a matter of estoppel.⁸⁸

In British India the Legislature has expressly enacted in Explanation IV. that a decision liable to appeal may be final until the appeal is made. A full Bench of the Allahabad High Court, however, has held in *Balkishan v. Kishanlal*,⁸⁹ that the Explanation is consistent with the view of the continental jurists, and that an appealable judgment is not definitive, but only provisional; and not being final, cannot operate as *res-judicata*. Mr. Justice Mahmood (with whom Sir John Edge, C. J., and Straight, J. concurred) said in his decision in the case, "so far as my knowledge of English law is concerned, the point now under consideration is not settled by any long course of decision in England or India. Nor, has the Legislature in framing Explanation IV. of Sec. 13 removed the doubt. As Mr. Justice Holloway has pointed out, the view of continental jurists is that judgments still liable to appeal and those that have actually been appealed from, the appeal being still pending, cannot operate as furnishing basis for the rule of *res judicata*. Pothier points out⁹⁰ that . . . 'a provisional condemnation then cannot have either the name or the authority of *res judicata*,' . . . that judgments still liable to appeal stand, for the purpose of *res judicata*, on the same footing as provisional judgments and that the effects of such judgments are only momentary and cease as soon as an appeal is made. This is the case even where the sentence ought to be executed provisionally, notwithstanding the appeal, for such execution only gives the sentence the effect of provisional judgments, which, as we have already mentioned, have not the authority of *res judicata*." Even in this view a judgment will become final before the expiry of the period of appeal, if the judgment-debtor shows his acquiescence in it as by payment. In fact, the established rule of the French law is, *les sentences et jugements qui doivent passer en force de chose jugée sont ceux rendus en dernier ressort et dont il n'y a appel, ou dont l'appel n'est pas recevable, soit que les parties y-eussent formellement acquiescé, ou qu'elles n'en eussent inter-jeté appel dans le temps, ou que l'appel ait été déclaré pèri*. The view generally taken by the Indian High Courts is, however, in favor of giving to an appealable decision the effect of

res judicata till it is appealed against, when it ceases to be *res judicata*, and does not operate as such again unless it is adopted by, and thus becomes the decision of the Appellate Court. Thus in *Nilvaru v. Nilvaru*,⁹¹ Melvill, J., in delivering the judgment of the Bombay High Court, said that it clearly appeared from the Explanation, that when a judgment “upon a particular issue is appealed against, that judgment ceases to be *res judicata*, and becomes *res sub-judice*; and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal, . . .

. . . and that Explanation introduces no new law, but merely states the law as it previously existed.” The Calcutta Court has held the same. In *Gungabishen v. Roghoo-Mitter*, J., in delivering the judgment of a Division of the Calcutta High Court said,—“Supposing that there was a decision by the Courts below in the previous suit on the question of title, it was not a final decision, as it was brought up in appeal before the High Court, and that Court, in dismissing the plaintiff’s suit, decided that it was not necessary to go into the question of title, and based its decision entirely on the ground that the plaintiff had failed to prove his possession. That being so, the question of title is still open between the parties.” In *Chunder Coomar v. Sib Sundari*,⁹² Sir Richard Garth, C. J., in delivering the judgment of the Court, said “when the decision of a lower Court is appealed to a superior tribunal, and that tribunal for any reason does not think fit to decide the matter, it is left an open question. We have held so here over and over again;” and it is not because in point of form the appeal in the first suit was dismissed, that the decision of the Munsiff can be considered as confirmed.”

Thus, in *Ramnath Roy v. Chunder Sekhur*,⁹³ said : “It is true Sudder Ameen did, in the former case, try the issue which is now raised between the plaintiff’s and Chunder Sekhur Roy’s brothers. But this Court, by its decision on appeal, if not directly, at least impliedly, ruled that, looking to the relief which the plaintiff then claimed, that issue was not one which arose in that suit, and which was not material to it, inasmuch as, even if the plaintiff was entitled to a decree upon it, he could not obtain the relief he sought for. This Court, accordingly, did not proceed on appeal to try whether the judgment of the Principal Sudder Ameen on that issue was correct or not; and though it confirmed the final order of the Principal Sudder Ameen, it, by its judgment, virtually set aside the judgment of the principal Sudder Ameen on the issue in question, not on the merits, but on the ground that it was not one which arose in the suit. The plaintiff is, therefore, in my opinion, fully entitled now to a decision on the merits on the issue.”

⁹¹ 1 L. R. VI Bom. 110.
⁹² 1 L. R. VII Cal. 201.

⁹³ 1 L. R. VIII Cal.
⁹⁴ IV W. R. 20.

The same was held in *Turley v. Turley*,⁹⁵ in which the Appellate Court omitted to consider a point adjudicated upon in the judgment appealed against, and it was held that the adjudication would not be *res judicata* in a subsequent suit, for the taking of the appeal vacated the judgment, and the point was not determined again above. Speaking of the French law, Lacombe says:—*que lorsqu'un jugement de première instance vient à être confirmé sur l'appel, mais par des motifs différents de ceux qui ont décidé les premiers juges, c'est dans l'arrêt seul que doivent être pris les points revêtus de l'autorité de la chose jugée.*⁹⁶ However, if a decree of a joint character against two persons is reversed on appeal by one only, the reversal will have effect against both, and on that account the decree will cease to be *res judicata* even as against the defendant who had not appealed.⁹⁷ The Madras High Court held in *Vythilinga v. Vijayathammal*,⁹⁸ that when an appeal was withdrawn on account of mutual compromise, the decision appealed against would become final and therefore would be *res judicata*.

65. An application for retrial does not have the same effect as an appeal, and while pending and undetermined does not destroy, or in any way affect, the operation of the judgment as *res judicata*, the judgment being held to be conclusive in a suit begun in the interval on the same cause of action.⁹⁹ It has been held in some cases that the effect of such an application is to vacate and render wholly inoperative the prior judgment, and that thereafter the prior judgment cannot be pleaded or given in evidence for any purpose in any subsequent suit.¹⁰⁰ The weight of authority is however against that view. The rule appears to be the same in British India also, as there is no such provision in Sec. 13 with regard to an application for new trial as for an appeal, and a judgment liable to review has been unreservedly declared final by Explanation 4.

66. An issue cannot be said to be finally decided in a suit, unless the decision thereof forms the basis of the judgment in that suit.¹ Thus in *Ran Bahadur Singh v. Lucho Koer*,² the Calcutta High Court found that the plaintiff had been joint

⁹⁵ 85 Tenn. 251.

⁹⁶ *Lac. Chose Jugée*, 74.

⁹⁷ *Pittsburgh v. Reno*, 123 Ill.

⁹⁸ 1 L. R. VI Mad. 43.

⁹⁹ *Casebeer v. Mowry*, 93 Am. Dec. 700.

¹⁰⁰ *Young v. Brabe*, 3 Am. Rep. 602.

¹⁰⁰ *Sheldon v. Van Vleck*, 106 Ill. 45.

Preacher's Aid Society v. England,
121.

v. Kanaya, 1 L. R. IV

134.

Gama v. Amira, 1894 P. R. No.

² L. R. XII I. A. 23.

with his deceased brother whose estate he, on that account, claimed from his widow, but the claim was dismissed on the ground that the issue as to their being joint had been decided against the plaintiff in a former suit. On appeal by plaintiff, Sir R. P. Collier in delivering their Lordships' judgment, observed as to the widow's appeal against the finding in regard to the brothers having been undivided, that it could not be conclusive against her hereafter "as the decree was not based upon it, but was made in spite of it."² In *Nundo Lall v. Bidhoo*,³ the plaintiff's claim in the former suit for the defendant's ejectment was dismissed, but the judgment contained a decision as to the nature of the defendant's holding; and in the subsequent suit for possession after notice to quit, O'Kinealy and Macpherson, J. J., held that that decision was not *res judicata*, as "the decree dismissing the suit was not based on the finding adverse to the defendant in that case, but in spite of it." In *Magundeo v. Mahadeo Singh*,⁴ the facts were the same, and Tottenham and Ghose, J. J., held that the decision as to the occupancy right in the former suit was not *res judicata*, observing "that the finding of the Court in the previous suit was not final, inasmuch as the decree was not based upon it."

In *Anusayabai v. Sakharam*,⁵ it was urged that "though the decision was in the appellant's favor, one of the grounds on which it was based had been decided unfavourably to the appellant's title, and might thus, as *res judicata*, greatly prejudice her in a future suit between her and the respondent." But West, J., in delivering the judgment of the Bombay High Court, said:—"This fear, though there are some decisions and *dicta* which support it, does not appear to be well grounded. The judgment is not, and cannot really be based on a ground unfavourable to the successful party, though an opinion unfavourable to him may be expressed on some incidental point. . . . From a judgment against a plaintiff no adjudication in his favor can properly be derived as *res judicata*. It is not, and cannot be, an essential element of the jural relation on which an adverse decree rests." The majority of the Full Bench of Allahabad High Court in *Jamaitunnissa v. Lutfunnissa*⁶ held that "the

² The contrary was held by Calcutta High Court in *Viswanath Khan v. Phadu* that decision has not been generally followed, and was in some cases expressly

³ I. L. R. XIII Cal. 17.
⁴ I. L. R. XVIII Cal. 647.
⁵ I. L. R. VII Bom. 402.
⁶ I. L. R. VII All. 606.

⁷ I. L. R. VI Cal.
⁸ *Narain Das v. Faiz Shah*, 1880 P. B. No. 157
 F. B.
Nundo Lall v. Bidhoo Mookhy, I. L. R. XIII
 Cal. 17.

findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision." ^a That High Court has recently held the same again in *Indarjit Prasad v. Richha Rai*,⁹ in which in the former suit an unlimited decree had been given to the then plaintiff of his claim for possession and title, but there was a statement in the judgment that the plaintiff's possession would be subject to the defendant's right to half the value of the produce and half the value of the timber, and Sir John Edge, C. J., and Knox, J., said,—“Sec. 13 was never intended to bar the trial of a material issue in a suit, because the Judge in a previous suit where that question was absolutely immaterial had tried the question and given an opinion upon it. . . . The decree is the final judicial determination of the suit, and if a decree is specific and is at variance with a statement in the judgment on which it is founded, it is the decree to which we must pay attention and not to the statement in the judgment.” The Madras High Court also in *Muttukumarappa v. Arumuga*¹⁰ held that a finding against plaintiff on an issue, when not necessary for the final decision which was entirely in plaintiff's favor, would not be *res judicata*.^b

^a Mr. Justice Mahmood alone dissented, and maintained “that the adjudication as to the invalidity of the *waghtama* would be binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on the ground that she held possession in lieu of dower.” In support of this view he relied on a number of cases, and observed that in *Man Singh v. Narayan Dax*,¹¹ the Court (having determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which was not required for its disposal; and it was held that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit.

^b In *Venbagga v. Narasamma*,¹² Muttusami Ayyar & Brandt, J.J., said, that “in *Krishna Behari Roy v. Brojeswari*,¹³ the Judicial Committee of the Privy Council observed that the adjudication on the question of adoption in a previous suit concluded the party claiming to be adopted in a subsequent suit, although the decision in the former suit proceeded on the finding that a *patni* lease granted by the mother of the plaintiff was not in excess of her powers as a widow, and although the determination that the adoption was true was not necessary to the dismissal of the claim, though it would certainly be material to the ground of claim.” There is nothing, however, in their Lordships' judgment to show that their final decision did not proceed on the ground of the adoption, which was the only point in issue in the previous suit as between the plaintiff and the intervenor who would certainly have been the heir if the plaintiff's adoption were not held valid. The observation of the Madras High Court Judges was rather an *obiter dictum*, as they really held that the decision in the former suit had not proceeded only on the ground of the invalidity of the oral will on which the plaintiff's claim was based, and were not prepared to adopt the view that the issue as to division or non-division was not material to the decision recorded in that suit.

⁹ I. L. R. XV All. 3.
¹⁰ I. L. R. VII Mad. 165.
¹¹ I. L. R. I All. 480.

¹² I. L. R. XI Mad. 207.
¹³ I. L. R. II I A. 263.

A Full Bench of the Punjab Chief Court laid down broadly in *Narain Das v. Faiz Shah*,¹⁴ that "no matter can be said to be directly and substantially in issue, or to be finally decided, unless a decision thereon is necessary for the decision of the case upon the ground on which the final decision ultimately proceeds." The decision in *Pala Mal v. Maya*,¹⁵ is not against this view. There the plaintiffs' former suit had been dismissed "on the ground that they could not sue for a declaratory decree, and also on the ground that it was bad on the merits (and the) decree was just as much based on the one ground as on the other;" and Stogdon, J., in giving the judgment of the Court, observed that there was no reason against his deciding every point upon which he intended to base his decree. He added, however, that "any decision regarding points upon which it was not intended to base it, would be unnecessary and extra-judicial, and would not be binding on the parties," and distinguished the cases reported as 1884 P. R. No. 29, and 1879 P. R. No. 27, on the ground, that "the finding which was held not to operate as *res judicata* was one upon which the decree was not based, and which was absolutely unnecessary to the decision of the case."

The same view has been taken in the English and the American Courts also. The Kansas Supreme Court has even held, that "while it may be the general duty of the Court trying a case to find upon all the issuable facts, yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment."¹⁶ Where, however, the record in a suit presents two points, upon either of which the decision might turn, and the Court determines both, the decision of neither can be considered as an *obiter dictum*, and the judgment is authoritative on both points.¹⁷ Apparently this will be so only, if the decision really turns on both the points, and a different rule may be held to apply if it cannot be determined that it turned absolutely on either. The French jurists have discussed the question on general principles. Lacombe says:—*il se peut en effet que le tribunal, en partant de suppositions alternatives et contradictoires, arrive par une sorte de dilemme à déclarer que dans les deux cas la demande est également bien*

¹⁴ 1880 P. R. No. 187.
¹⁵ 1880 P. R. No. 146.

¹⁶ *Mitchell v. Insley*, 7 Pac. R. 201.
Auld v. Smith, 23 Kans. 61.
¹⁷ *Hawes v. Water Co.*, 5 Saw. 227.

ou mal fondée. Alors, il n'y aura pas de raison pour aller au delà de ce qu'il aura décidé et pour faire un choix qu'il n'a pas voulu faire lui même. Il nous paraîtrait même devoir en être ainsi, bien que le juge eût exprimé sa préférence pour l'une des deux hypothèses: ainsi, dans la dernière espèce que nous avons posée, le jugement pourrait être ainsi conçu: "attendu que par tel ou tel motif la donation est nulle; qu'au surplus, ne le fût-elle pas, la somme donnée ne serait pas susceptible d'entrer en compensation, parce qu'elle n'est ni liquide ni exigible. . . etc." Nous trouvons en effet dans ce doute qui accompagne l'expression de la pensée du juge une raison suffisante de lui refuser l'autorité de la chose jugée, car enfin comment les parties pourraient—elles être forcées de la considérer comme vérité, 'res judicata pro veritate accipitur,' si le juge lui-même n'a osé en affirmer hautement le bien fondé.¹⁸

67. A considerable extension has been made in the scope of the word decision by Explanation III, constituting, as it does, an omission by a Court to grant any relief claimed in the plaint, tantamount to a dismissal of that claim. Even under the Code of 1859 the Allahabad High Court held that where in a suit for money, a lien on the property hypothecated for that money was claimed, the grant of merely a money-decree would bar a subsequent suit for the lien. Thus in *Muluk Fugeer Buksh v. Manohur Doss*,¹⁹ the High Court observed that if the plaintiff having preferred that portion of the claim which sought to charge the land "was content to accept an imperfect adjudication, or one which awarded him only a part of the relief claimed, he cannot now bring forward in a fresh suit, matter which ought well have been thus disposed of." In a later case,²⁰ a majority of the Full Bench of the High Court held the same, but Sir Robert Stuart, C.J., and Pearson, J., dissented from the opinion of the majority on the ground that "the determination of a suit is not necessarily the same thing as the determination of the cause of action on which the suit is brought. A decree which ignored and failed to dispose of a cause of action alleged, can hardly be said to determine it, without violence to the natural and ordinary acceptation of the terms. Such a negative determination as an omission to determine, can scarcely be called a deter-

¹⁸ II All. N. C. R. 20.

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VII All. H. C. R.

mination at all." In *Bakshiram v. Darku*,²¹ it was contended that a decree for the redemption of a certain land would bar a suit for the trees standing on that land, but the contention was overruled by the Bombay High Court, Mr. Justice West observing in the judgment of the Court that "the claim in that suit might reasonably have been, and ought to have been, construed to include them, and that the Court having failed to adjudicate upon this portion of the claim, a fresh suit based on it is competent to the plaintiff."

The principle of the Explanation is of general application, however, and is often recognized by the American Courts also, which have repeatedly held that the omission of a Court to award relief prayed for is an adjudication, in effect, that the plaintiff is not entitled thereto. Thus if in a suit on a mortgage-bond, judgment is given for the money only, without an order of sale, it is held conclusive as to the plaintiff not having a lien, and he cannot afterwards maintain a suit to foreclose the mortgage.²² So also where the plaintiff brings a suit for two parcels of land, and recovers only one, or for a large tract of land and recovers only part thereof, the record, though silent as to the tract not recovered, is conclusive that the plaintiff is not entitled thereto.²³ So where there is an averment of damages and the Court fails to find upon the issue created by the denial of that averment, and no judgment is rendered for damages, the judgment will bar any further action to recover the same damages.²⁴ It is on this same principle, that it has been held that a fresh suit will not lie for items of account which were specified in the statement of cause of action in a former suit, and though known to exist, were for some reason overlooked and not considered,²⁵ and not even if they have been omitted simply by an error of the Court in rendering the judgment.²⁶ Even when the plaintiff failed to recover the whole amount due on a bond upon which the suit was brought, merely through the error of a referee in a previous suit, the judgment would bar a suit for the residue.²⁷ Mr. Herman says, "It is not a material question as to whether plaintiff was allowed this item in the other

²¹ X B. H. C. R. 3

²² *Johnson v. Murphy*, 17 Tex.

²³ *Thompson v. McKay*, 41 Cal.

290.

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Co. v. Deferrari.

v. Alexander, 21

v. Smith, 14 Mich.

v. Dyer, 50 Md.

, 377.

action or not. If it was presented, evidence introduced upon it, and it was not withdrawn, but submitted with the case, the judgment is a complete bar, and the plaintiff cannot be heard to say that he did not intend to include this claim in the other suit.^{28 29}

68. The first essential to the application of Explanation III is that the relief claimed in the subsequent suit must have been asked for in the former suit. In *Umrao Lal v. Behari Singh*,³⁰ the Explanation was held not to bar a suit for enforcing a lien as to certain instalments of a bond, because the said instalments accrued due subsequent to the former suit in which only a declaration of the plaintiff's right to recover them was asked, and the lien was unsuccessfully prayed for only in regard to the instalments already due. It is further necessary that the relief asked in the former suit should have been asked for independently, and not merely as ancillary to the main relief claimed. In *Fatmabai v. Aishabai*,³¹ the plaintiff had, in a prior suit for money improperly withheld, asked for a declaration as to her being the wife of a certain person, and the decree did not make that declaration. The Explanation III was held not to apply on the ground, as observed by Sir Charles Sargent in delivering the judgment of a Division Bench, that "the declaration was not sought for by way of specific relief, but simply as the ground for the real and substantial relief, to obtain which the suit was instituted." In the Original Court also, Scott, J., had said that the Explanation "refers to the case where several heads of relief independent of each other are claimed, put in issue, and duly controverted, and one of them is neither granted or refused."³² In *Thyila Kandi Ummatha v. Kunhamed*,³³ the plaintiff had previously sued for a *paramba*, alleging that it was his and that he had let it to the defendant. The Court dismissed the suit on the ground that the letting was not proved, and in a subsequent suit by plaintiff for the same *paramba*, it was contended that, as its possession was asked for in the plaint, and not decreed, it must be regarded as having been refused; within the meaning of Explanation III; but the Judges said—"that

²⁸ *Strut v. Beckman*, 43 Iowa, 498.
²⁹ *Baker v. Stinchfield*, 57 Mo. 261.
³⁰ *Horn, Comm.* 236.
³¹ *I. L. R. III All* 297.

³² *I. L. R. XIII Bom* 242.
³³ *I. L. R. XII Bom* 467.
³⁴ *I. L. R. IV Mad* 376.

Explanation must be read with the section, and clearly applies to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue. The *causa petendi* in the former suit was the existence of the relation of landlord and tenant and the omission to pay rent which entitled the plaintiff to recover the property. The title, no doubt, was in issue, but not directly and substantially, only incidentally, and that relief is prayed for on wholly different grounds."

69. It was often held under the Code of 1859 that a claim for mesne profits in a suit for possession of land, in which there was no enquiry and order about them, would not bar a subsequent suit for them.³⁴ Even under the present Code it has been held in *Mon Mohun Sirkar v. Secretary of State for India*,³⁵ that if in a suit for

Subsequent suit will not lie for mesne profits, that were asked for and not allowed, even though they might not have been asked for.

land, mesne profits are claimed from the date of dispossession to the date of the restoration of possession, and the Court awards mesne profits up to the date of the suit only, a fresh suit for mesne profits from the date of suit will not be barred. Mr. Justice Amir Ali, in delivering the decision of Mr. Justice O'Kinealy and himself, said :—"The defendants contend that it is barred under the provisions of Explanation III. It is urged on their (plaintiffs') behalf that as it was discretionary with the Court in the former suit to assess the mesne profits subsequent to date of suit, the mere fact that the Court abstained from exercising that discretion does not constitute the present suit a *res judicata*. We think this contention to be sound. No authority has been cited for the defendants in support of their contention that the plaintiffs are precluded from maintaining the present action. They have relied simply on the words of the section, but as the question is *res integra* we are at liberty to construe the section reasonably by a comparison of the other sections of the Code. It is admitted that at the time the plaintiffs instituted their former suit, they had no cause of action with respect to mesne profits accruing due after date of suit; and they would not have been entitled to ask any relief in respect thereof, but for the provisions of Sec. 211 But the section is not imper-

ative or obligatory. . . . There is nothing in principle or law to lead to the conclusion that the mere abstention of the Court to award to the plaintiff mesne profits after date of suit would be a bar to any suit in respect thereof . . . The cause of action in respect of the continuing trespass after institution of suit arises from day to day, and it is only by express enactment, and in order to avoid a multiplicity of suits, that the Courts have been vested with the discretion of awarding damages during the continuance of the trespass and until its cessation. It does not follow that because plaintiff prayed for assessment of damages until he was restored to his property, and the Court in its discretion was satisfied with decreeing his claim for damages so far as they had accrued due, his claim for damages for trespass continued after suit would be barred by the rule of *res judicata*. Were we to uphold the contention urged by the *defendant's* pleader, the result would be, as pointed out by Phear, J., in the case of *Haramohini v. Dhanmani*,⁵⁶ "that an unsuccessful defendant directed by the Court to give up possession of the property held by him to the plaintiff might with impunity withhold possession from the plaintiff, notwithstanding the decree in which possession of the property is directed to be delivered over, keeping the plaintiff out by main force under every circumstance of aggravation, without the slightest apprehension or risk of having damages assessed against him." This decision is hardly tenable in the face of the clear language of Explanation III; and the contrary has been held in *Ramabhadra v. Jagannatha*,⁵⁷ in which the plaintiff in the former suit prayed for future mesne profits of the plaintiff's share of the property sued for, and the decree did not say anything about them; and it was held that a separate suit would not lie for them. Muttusami Ayyar and Weir, JJ., said:—"The legal effect of Explanation III is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal and the claim thereto in a fresh suit as *res judicata* It may be that they were not bound to claim an adjudication in their plaint, but when they once elect to claim an adjudication under Sec. 211, and by such election make it a part of the subject-matter of the suit, they must either withdraw the claim with the express permission of the Court to institute a fresh suit, or be bound by the result of that suit."

⁵⁶ I. B. L. R., 4. C. 129.

⁵⁷ I. L. R. XIV Mad. 329.

CHAPTER IV.

IDENTITY OF PARTIES.

70. A matter to be *res judicata* must have been in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title. It is a fundamental proposition of the doctrine of *res judicata*, that a decision in a suit operates and can operate as such only between parties to that suit and their privies. In its elementary form, this proposition was recognized even among the Romans, and found a frequent expression in their maxim, *Res inter alios acta aliis nec prodest nec nocet*. It was a general saying: *res inter alios judicata neque emolumentum offerre his qui judicio non inter-fuerunt, neque prejudicium solet irrogare*. The principle was explained fully by eminent jurists, and the rule of *res judicata* is not recognized in any country without some such limitation or reserve. The French jurists after referring to the *subjectif* and the *objectif* elements of a suit, say of the former *ce sont les parties elles mêmes, le demandeur et le défendeur*, and add *si l'un de ces éléments varie, ce n'est plus le même procès dont il s'agit*. . . . *L'autorité de la chose jugée ne devra donc être appliquée que lorsqu'il y aura identité des éléments des deux procès: identité objective, identité subjective, telles sont les deux conditions suffisantes, mais nécessaires pour constituer l'autorité de la chose*

In Buller's *Nisi Prius*, the rule and its reason are stated to be that "the verdict ought to be between the same parties because otherwise a man might be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that a man should be injured by a determination that he, or those under whom he claims was not at liberty to controvert." Sir William De Grey in his judgment in the *Duchess of Kingston's* case admitted it to be "true as a general principle that a transaction

* *Law. Cases Digest*, 95

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† *Ibid* p. 338.

between two parties, in judicial proceedings, ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties and all claiming under them, are not in general, to be used to the prejudice of strangers." Mr. Freeman, speaking with further particularity, says—"Whether a judgment is relied upon as an estoppel, an adjudication of the validity or invalidity of a claim or writing, the foreclosure of a lien, or as a muniment of title, it is inadmissible, except as against persons who were parties to the suit, or in privity with such parties, or in such a position that they were the real parties in interest in a litigation conducted for their benefit in the name of another under such circumstances as to make them answerable for the result of the litigation." In fact, so strict is the rule, that in this country, the Madras High Court has recently held in the case of *Chinnasami v. Hariharabadra*,¹ that as a judgment of a Probate Court granting or refusing probate is *in rem*, the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the *factum* of the will propounded in that Court.

71. The very first question is as to who are the parties to a suit, and rather different views have been taken by different judges and text-writers. It has been said, on the one hand, that "parties to a judgment are those whose names appear upon the record as plaintiff and defendant;" and that none are to be considered as parties to a suit, and bound in that character by a judgment or decree therein, but those who are named as such in the record thereof." This statement appears to be rather too narrow. It has been held that if a summons is served on a person intended to be sued, by a wrong name, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained, he is concluded and in all future litigation may be connected with the suit or judgment by proper averments; and when such averments are made and approved, the party intended to be named in the

¹Fr.
I. L. R. XVI Mad. 389.

| *Walters v. Wood*, 16 N. W. R. 116.

judgment is affected as though he were properly named therein.⁶

In Taylor's work on 'Law of Evidence' it is said, that "under the term parties in this connexion, the law includes *all* those who are *individually named in the record*, and who are consequently entitled to prosecute or defend the cause, to adduce testimony, to cross-examine witnesses called on the other side, and to appeal from the judgment, should an appeal be allowable by law."⁹ He doubts "whether the term *parties* will also include persons not named in the record, but in *whose immediate and individual behalf the action has been brought or defended*,"¹⁰ and shows that the case of *Kinnersley v. Orpe*¹¹ did not decide that in the affirmative, and that Lord Ellenborough in *Outram v. Morewood*,¹² expressed his astonishment that an estoppel in such a case could ever have been thought of. But he adds that "the landlord, or other person, in whose right a defendant in replevin has made cognizance, has been held to be a party to that suit;¹³ and it would certainly be convenient and reasonable if the rule, in conformity with that which governs admissions, were extended to all persons who were substantially parties to the former action. Indeed, it is highly probable, notwithstanding the absence of direct authority, that the courts would now determine in favor of such extension." The American Courts actually hold that the term parties, as used in connection with the doctrine of estoppel, "includes all who are directly interested in the subject-matter of the suit and have a right to make defence, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment,"¹⁴ and that only those who have enjoyed all these privileges collectively should be concluded by the judgment.¹⁵ Mr. Herman says, "a Court will look beyond the record and treat as parties all who are found to have in fact acted a part, and this whether their interference was irregular or not

⁶ The discussion in *McKinley v. Tuttle*,⁷ is not against this view, as there the judgment passed against the wrong name was held void, because the defendant answered by his right name and still the plaint was not amended by the insertion of it. In *Johnston v. San Francisco*, S. U.,⁸ also, the defendant's true name was not inserted in the pleadings even when known, but judgment was entered against him by the true name, and it was held to be v . . .

⁹ *Barry v. Brothers*, 6 Rich. 331.
¹⁰ *Barry v. Woodson*, 64 Am. Dec.
¹¹ 43 Cal. 371.
¹² 7 Am. 51

Tay. Ev. 1440.

517.
 3 T. R. 390.
¹³ *Hancock v. Welsh*, 1 Stark. 347.
¹⁴ *Robbins v. Chicago*, 4 Wall. 637.
Ashton v. City of Rochester, 3^d Am. St. Rep. 619.
¹⁵ *Cecil v. Cecil*, 61 Am. Dec. 634.

One who is benefitted by the prosecution of an action, of which he has notice, is to be regarded as a party in interest, although her name does not appear therein.¹⁶¹⁷ So also Lumpkin, J., observed in *Brown v. Chaney*,¹⁸ that "under the term parties the law includes all who are interested in the subject-matter of litigation, who will be gainers or losers by its result, and for or against whom the record of the former proceedings might be adduced in evidence in another trial; those who have the right to be heard, and to offer testimony and examine the witnesses." Similarly, Comstock, J., in *Castle v. Noyes*¹⁹ said: "It is by no means true that, in order to constitute an estoppel by judgment, the parties on the record must be the same. The term has a broader meaning. It includes the real and substantial parties who, although not upon the record, had a right to control the proceedings and appeal from the judgment." In *Hill v. Bain*,²⁰ Durfee, C. J., in delivering the judgment of the Supreme Court of Rhode Island, referred to a number of cases in which the defendants were permitted to avail themselves by way of estoppel of judgments to which they were neither privies nor parties, and said: "The ground on which this was permitted seems to have been that the defendants, though not parties to the judgments, were so connected in interest or liability with the parties that the judgments when could be regarded as virtually recovered for them, for the purposes of estoppel, as well as by and for the parties of record."

Dr. Bigelow adds, however, on the authority of some American decisions,²¹ that even those who assume such a right as that of controlling the proceedings, making defence, adducing and cross-examining witnesses and of appealing from the decision, if an appeal lies, are included under the head of parties.²² Even Mr. Black observes, that "persons often connect themselves with a suit, by actively assuming the prosecution or defence, and thereby become bound by the result of the litigation, although not appearing on the record."²³ Mr. Hawes in still broader language says, that the term "party to a suit" seems properly to be applied to "every person who has an interest in the conduct and event of a litigation, whether he be a party in form, a party in interest, or a

¹⁶ *Larum v. Wilmer*, 35 Iowa, 244.
¹⁷ *Markham v. Thompson*, 23 La. Ann.

¹⁸ *Herm. Comm.* 157.

¹⁹ 1 Kelly,

²⁰ 14 N. Y.

²¹ 3 Am. St. Rep.

²² *Stoddard v. Thomson*, 31 Iowa, 80.
Landis v. Hamilton, 77 Mo. 554.
Winchester v. Meiskell, 119 U. S.

81.

party not before the Court."²⁴ There are decisions also in support of that view. Thus the equitable assignee of a chose in action has been held to be estopped by the judgment thereon in the same manner as if he were a party to the record, because though not nominally a plaintiff or defendant, the suit is for or against his interest.²⁵ In *Tate v. Hunter*,²⁶ Mr. Chancellor Dargan said:—"The sheriff in the former action was only a nominal party; the defendant in the present case being the real party in interest. The sheriff was simply a stake-holder without a particle of interest the battle was fought over his shoulders by the real parties. The defendant was not only the real party adverse in interest to the complainants, but he had notice of the suit and defended it by counsel." In *Claffin v. Fletcher*,²⁷ it was held that whenever it should appear that the real party in a suit was not a party to the record, but prosecuted or defended the suit in the name of a nominal party, he would be concluded "by the judgment as effectually as if he had been a party to the record." A judgment in ejectment has been often held to bind parties who voluntarily appear as defendants therein, and file an answer denying the plaintiff's allegations, and alleging ownership of the premises sued for in themselves, although they were not named as parties in the plaint, nor served with summons, nor was the plaint amended to include their names, nor any order of Court granted allowing them to appear.²⁸ On the same principle, it has often been held that where a vendor warrants title to the chattels sold, and in a suit for them against the vendee assumes his defence he will be estopped by the judgment.²⁹ Similarly, where in a suit against a guardian to set aside for fraud a release given by the ward, the sureties on the guardian's bond employ counsel to defend, the sureties paying costs and expenses in the suit, they cannot claim to be not bound by the decree on the ground of not having been defendants on the record.³⁰

It has even been held in some cases, that one who instigates and promotes a suit for one's own interest, by employing counsel and binding oneself to the payment of costs and damages is barred by the judgment obtained.³¹ It is clear, however, that a person thus intervening in a suit

²⁴ Haw. Jur. 31.

²⁵ *Rogers v. Haines*, 3 ———
Hill v. United States, 7 Cal.

²⁶ 3 Strobl, Eq. 136.

²⁷ 7 Fed. Rep. 651.

²⁸ *Estelle v. Peacock*, 12 N. W. R.

Jones v. Pashby, 41 Mich. 634.

²⁹ *Parr v. State*, 17 Atl. R. 1030.

v. Hamilton, 77

v. Murray, 3 Wall. 1

v. Garvin, 118

of which he is not a party of record will be bound only—(1) if the intervention is for the protection of some interest which he may have in the subject-matter of the litigation or which on the ground of some express or implied contract consists in a responsibility over to the defendant, and must attach if judgment goes against him; and (2) if the intervention is so complete that he is practically substituted for the defendant in the management and control of the case, and also avowed and with notice to the opposite party, and not upon a secret understanding. Thus Dr. Bigelow observes that parties “must be openly such; there can be no secret parties in benefit, unknown to the adverse side.”⁵² In *Cannon River Mfrs'. Ass'n. v. Rogers*⁵³ the parties were held not to be the same as in a former suit, as whatever part the defendant had taken in that case, it was not with the knowledge of the plaintiff; Gilfillan, C. J., observing that “if it be conceded that one not a party to an action may be estopped, or claim an estoppel, by the judgment, because he is the real party in interest and conducts the defence, yet he must do so openly, and to the knowledge of the other party, and for the defence of his own interests.” Mr. Black, citing a number of American decisions,⁵⁴ says, that a person “employed the attorney who appeared for the defendant of record; that he himself testified as a witness; that he was present and aided in the conduct of the trial; that he cross-examined the witnesses; that he lent assistance in money or services to the defendant; that he joins in taking an appeal;—none of these circumstances alone is sufficient to make him a party to the judgment.”⁵⁵ Similarly Mr. Freeman observes that the fact that a person “managed the cause as agent or attorney, or interested himself in it, and aided the prosecution or defence with or without any employment for either party, will not preclude him from impeaching the judgment.”⁵⁶

72. In British India the question has risen often with regard to what are called *benami* parties. *Benamidars* are parties. The procedure of the Courts here is not elastic enough to allow a person really interested to openly and avowedly conduct or defend a suit as a plaintiff or defendant without actually becoming so on the record. Still the general principles underlying the above decisions of the American Courts have been recognized here.

⁵² Big. Estop. 11.⁵³ 16 A. M. St.⁵⁴ Schrodor v. LaRue, 1 N. W. R. 801

Lacroix v. Lyons, 33 Fed. Rep. 437,

⁵⁵ Bl. Jud. 645.⁵⁶ Pr. Jud. 340.

Mr. Broughton, in his Commentary on the Civil Procedure Code, expressed it as his opinion that "the Court would look to the real parties in a *benami* transaction, and if they were the same the action would be barred under this section."³⁷ In *Ramasami v. Virasami*,³⁸ Holloway and Innes, JJ., spoke of it as a well-established rule "that a decree binds not only the actual parties, but those on whose behalf it is manifestly brought." The observation was, however, not necessary for the decision of the case, as the parties to the subsequent suit held barred, were parties to the prior suit also, though not adversely to each other, but arrayed on the record on the same side. In *Khub Chand v. Narain Singh*,³⁹ it was found that in a former suit brought in the name of G., the minor son of the appellant, the appellant was the real plaintiff, and that the sale-deed, though ostensibly professing to be made to the minor, was actually executed to the appellant, and Straight, J., in delivering the judgment of a Division Bench said:—"The transaction therefore being *benami* in respect of G., it follows that he was a mere dummy in the subsequent suit for redemption instituted against the respondent, and we must hold that, though not in name, yet in fact, the appellant was a party to that litigation." In *Meheroonissa v. Hur Churn*,⁴⁰ Mr. Justice Dwarkanath Mitter appears to have assumed the contrary and observed that if a suit by a *benamidar* were decided against him, "the real owner in a subsequent suit instituted by himself would say 'my *benamidar* had no right to bring the former action, and I never authorized him to do so;' but what was really decided by the Court was only that a *benamidar* had no right to maintain a suit for property in which he had no beneficial interest. In *Gopi Nath v. Bhugwat Pershad*,⁴¹ Romesh Chander Mitter and Norris, JJ., held in unqualified terms, that "the proper rule is that, in the absence of any evidence to the contrary, it is to be presumed that the *benamidar* has instituted the suit with the full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself." In *Shangara v. Krishnan*,⁴² Parker and Wilkinson, JJ., referring to this decision, said:—"The presumption is that the *benamidar* instituted the suit with the authority and consent of the true owner, and the lower Courts have found upon the evidence that the suit was instituted with the knowledge of

³⁷ 1 L. R. 39.
³⁸ 111 M. H. C. R. 378.
³⁹ 1 L. R. 111 All. 512.

⁴⁰ X W. R. 220.
⁴¹ 1 L. R. X Cal. 706.
⁴² 1 L. R. XV Mad. 207.

the plaintiff. He is therefore as much bound by the decree as if he had himself instituted the suit, and the present suit is barred as being *res judicata*." A decision in a suit brought on behalf, and in the name of, a person without his authority is void, and will not operate as *res judicata* as against him.⁴³ In *Robson v. Eaton*,⁴⁴ the judgment-debtor even paid the amount of the judgment to the attorney who had brought the suit and recovered judgment, but as all that was without the authority of the plaintiff he was held entitled to recover again. It has been observed in a recent case by the Supreme Court of Indiana that if B. personates A. or prosecutes a suit in A.'s name without his knowledge, the judgment will be void.⁴⁵

The position of a beneficiary is rather different from that of a *benamidar*, but to some extent, on the same principle, beneficiaries have sometimes in England, as well as in the United States, been held barred by a judgment against their trustee, and this even when the respective rights of the beneficiaries are not determined.⁴⁶ Thus where property is conveyed to trustees to hold in trust for the purpose of securing the payment of bonds or other debts, the trustees are held to represent the bond-holders, and a judgment by or against the trustees in proceedings conducted in good faith binds the holders of the bonds or other indebtedness.⁴⁷ It was held directly in *Peterson v. Lathrop*,⁴⁸ that one cannot be permitted, after adjudicating a matter by his trustee to disregard that adjudication. The equitable owner of a chose in action is bound to the same extent as if he were a party to the record.⁴⁹ A trustee to whom a rail-road company executes a mortgage upon its property to secure the payment of its bonds, represents the bond-holders in all legal proceedings carried on by him affecting his trust, and whatever binds him, if he acts in good faith, binds them.⁵⁰ The real party in interest cannot escape the result of a suit conducted by him in the name of another,⁵¹ and the fact of the suit being conducted in the names of nominal parties, cannot divest the case of its real character; but the issues made by the real parties and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision.⁵²

⁴³ *Markham v. Burlington Ins. Co.*, 20 N. W. R. 435.

⁴⁴ 1 T. R. 62.

⁴⁵ *State v. State*, 26 N. E. R. 517.

⁴⁶ *Whitford v. Crooks*, 20 N. W. R. 45.

⁴⁷ *Beals v. Illinois M. and T. Ry. Co.*, 133 U. S. 291.

⁴⁸ *Gilde v. Dwyer*, 63 Cal. 477.

⁴⁹ 34 Pa. St. 223.

⁵⁰ *Curtis v. Cass's Adm'r*, 1 Ohio, 432.

Boynston v. Willard, 10 Pick. 166.

R. R. Co., 100 U. S. 606.

Huntington v. R. R. Co., 16 Fed. Rep.

⁵¹ *Elliott v. Hayden*, 104 Mass. 190.

⁵² *Conger v. Chilcote*, 42 Iowa, 18.

Wood v. Ensol, 63 Mo. 199.

Cole v. Favorito, 60 Ill. 457.

73. In a suit on behalf of a minor by a next friend, the

A minor may be a party to a suit, so that a decision in it may be *res judicata* against him.

minor, and not the friend, is a party to the suit.⁵⁵ A judgment in such a suit will not be *res judicata* in a subsequent suit against the guardian himself.

Mr. Herman clearly observes,—“if an action is brought by A. as guardian of B., a minor, a judgment against A. as guardian is in his official capacity, and will not preclude him from maintaining a subsequent action in his own right, individually, and *vice versa*. For in the prior action, A., properly speaking, was not a party. The real party in interest was the minor, by A., his guardian.” But the minor being the real party in such a suit, the decision will be *res judicata* against him. Thus Mr. Herman says,⁵⁶ “if the guardian of a minor brings an action and is defeated, and the minor, after arriving at the age of majority, brings an action for the same matter, he may be precluded by the *exceptio rei judicata*, for he is the real party in interest in the former action, and in the absence of fraud or collusion, minors properly represented are bound as fully as if they had been majors and personally cited. . . . Judicial acts are obligatory on infants unless they avoid them by direct proceedings, and an infant is estopped from gainsaying the record in a collateral action. . . . When an action is brought against an infant, and he is represented in Court by his duly constituted guardian or the Court appoints a guardian *ad litem*, a judgment rendered in such action cannot be avoided. The weight of authority is, that an infant defendant is as much bound by a decree in equity or a judgment at law as a person of full age; and if a judgment or decree be absolute against him he will not be permitted to question it except upon the same grounds that a judgment can be questioned by parties *sui juris*; that is for fraud, collusion, or error.” Thus a decision by a Survey Officer in proceedings, under the Madras Forest Act, 1882, between a minor zamindar and the Government was held to be *res judicata* against the minor even though he was represented only by a manager appointed by the Court of Wards.⁵⁶ Nor will the decision be void, if the guardian exceeds his authority in connection with the proceedings in the suit. It has been contended by some French Jurists *que comme tout mandataire*

⁵⁵ *Sinclair v. Sinclair*, 13 M. and W. 640.

⁵⁶ *Herm. Comm.* 94.

⁵⁶ *Herm. Comm.* 178.

⁵⁶ *Kamraj v. The Secretary of State for India*,
I L. R. X.

qui a excédé ses pouvoirs, le tuteur n'est plus alors qu'un tiers par le fait duquel le pupille ne saurait être engagé; but Lacombe says: il nous semble plus juridique de voir dans le tuteur, même alors qu'il dépasse les bornes posées par la loi à son administration le représentant du pupille; car quoique la loi astreigne le tuteur à certaines formalités, elle ne fait point dépendre taxativement sa qualité de représentant de l'accomplissement de ces formalités. It appears to be, in fact, a general rule of French law, that a decision in a suit by a person not competent to sue without certain authority is not void collaterally if the suit is brought without that authority.⁵⁷

The real difficulty in such cases, arises, however, when the minor is not represented by a guardian. It has been held in some early cases in British India, that neither a minor nor any other disqualified person is considered a party to a suit, unless he is properly represented in it.⁵⁸ An illustration to that effect was expressly provided in Bill No. III. of Act X of 1877, but omitted along with all other illustrations, as unnecessary. The same view has been taken in several cases in the United States of America. Thus Mr. Herman says,—“where there is neither a natural or appointed guardian to protect the infant's rights, a judgment rendered against him is absolutely void.”⁵⁹ Dr. Bigelow says,—“in Georgia, Kentucky, Indiana, North Carolina, and perhaps elsewhere, judgments against infants sued without guardian are held to be voidable only, and hence not impeachable in collateral actions. In Illinois such judgments are held void.”⁶⁰ And this appears to be the better doctrine, at least where the Legislature has provided a special mode of action against infants;⁶¹ as there is in British India. Dr. Bigelow adds, however, that—“if an appearance were entered (on behalf of a minor) the judgment cannot be disturbed.” The defence of disability is personal to the one subject to it, and judgment against an adult in an action by him against an infant is of course conclusive upon him.⁶² Mr. Freeman,⁶³ on the other hand, treats the decision by the Illinois Court as “an almost isolated exception to the current of authorities, and says—“in Kentucky, by the provisions of the Civil Code, no judgment is to be rendered against an infant until after defence by a guardian. Yet a judgment pronounced after constructive service on an infant, without the appointment

⁵⁷ Lac. Chose Jugée, 116.

⁵⁸ Kaur Bein v. Sainiro, VIII P. R. 104.

Raj Deolubh v. Ooma Churn, XXI W. R.

⁵⁹ Herm. Comm. 180.

J. Porter, 23 Ill. 445.

⁶¹ Big. Estop. 118.

⁶² Kendall v. Titus, 9 Hawk. 727.

⁶³ Fr. Jud. 273.

of any guardian, was held to be erroneous, but binding until reversed.⁶⁴ The general tendency is to regard the plea of infancy as a personal plea which may be waived.⁶⁵ Though the statute requires the appointment of a guardian *ad litem* to represent the interests of minors who have no general guardian, it is well settled that where process has been served upon a minor, the failure to appoint a guardian *ad litem* for him is a mere irregularity not affecting the validity of the judgment." Mr. Black also appears to take the same view. Citing a considerable number of decisions,⁶⁶ he says,—“if a judgment is rendered by a Court, having jurisdiction of the parties and subject, it is held by the great preponderance of authorities, that it will not be void because the defendant was an infant and no guardian *ad litem* was appointed. . . . The omission to appoint a guardian does not impair the authority of the Court to proceed in the case, but is at most an irregularity in the exercise of its lawful jurisdiction, which, on settled principles of law, may impregnate its judgment with error, but cannot render it absolutely null.”⁶⁷ In Iowa and some other States, a decision against a minor on an appearance for him by an attorney⁶⁸ or a merely general guardian⁶⁹ instead of a guardian *ad litem* has been held not to be void, and this even when in spite of the express provisions of a statute, there is no process served on the minor.⁷⁰ It has been held broadly that the judgment will stand as a valid adjudication against the infant until reversed,⁷¹ and will not be open to a collateral attack.⁷²

74. In regard to a lunatic, there appears to be a general unanimity, that a decision against him, is not void, and there is a considerable difference of opinion even as to whether it is voidable. If a party to the suit is *non compos mentis*, the Court certainly ought to appoint a guardian *ad litem*, or to have his committee to protect his interests in the proceedings. But the failure to perform this does not affect the jurisdiction of the Court, but only the regularity of the proceedings. “Therefore it is” said the Court

⁶⁴ *Simmons v. M. Kay*, 11

⁶⁵ *Blake v. Douglass*, 27 Ind. 416.

⁶⁶ *Fide*, *O'Hara v. McConnell*, 13 U. S. 159.

Simmons v. Dentistry College, 30 Hun 344.

Ill. v. Day, 12 N. Car. 462.

v. Roney, 18 N. W. R. 704.

v. Page, 6 N. W. R. 716.

Parker v. Starr, 6 N. W. R. 424.

v. McGinniss, 37 Mo. 302.

11.

Ellis v. Van, 12, 9 Iowa,

Blake v. Har, 17, 47 Iowa, 201

Low v. Ford v. Cox, 4, 1 M.

Turner v. Douglass, 72 N.

⁶⁹ *Cott v. Cott*, 4 S. C. R. 151.

⁷⁰ *Smith v. McDonald*, 42 Cal. 694.

v. Marmon, 7 N. E. R.

v. Garner, 20 N. Car. 11

in *Johnson v. Pomeroy*,⁷³ "that the judgment of a Court having jurisdiction of the subject-matter of the suit, and of the person of such a party, notwithstanding such irregularity, is not absolutely void." "The fact that a person against whom a suit is commenced is, at the service of the process upon him, a person of insane mind, and that he so continued until judgment rendered, and that he appeared in person or by attorney or not at all" is a defect in the proceedings which, said the Court in *Lamprey v. Nudd*,⁷⁴ "renders them only voidable and not void."⁷⁵ Mr. Black, citing a number of American decisions,⁷⁶ says—"it is held by all the Courts that a judgment against a person who was *non compos mentis* at the time of its rendition, though without joining his legal guardian, is binding and conclusive upon him, is not to be impeached in any collateral action, and stands as a valid adjudication until annulled or reversed in some direct proceeding for that purpose."⁷⁷ Even an *ex-parte* judgment against a lunatic without his committee being a party,⁷⁸ and a judgment of confession upon a note and warrant of attorney given by a lunatic,⁷⁹ have been held not to be void.

75. Every person who is a party to the suit at the time of its decision is a party to it. Thus a person intervening in a suit at any stage thereof is invariably considered a party. If a person is admitted to appear and defend, but afterwards by leave of Court withdraws his appearance, he is not to be considered a party to the suit, nor privy to the judgment, nor bound by it.⁸⁰ So also where the name of a person is ordered to be struck off, he ceases to be a party, even though it should not have been struck off by mistake and appeared in the final decretal order two years afterwards. This was held directly by a Division Bench of the Calcutta High Court in *Kalee Coomar Dutt v. Pran Kishoree*,⁸¹ in which Glover, J., in delivering the judgment of the Court said—"after the order of this Court directing her name to be struck off, she had no further interest in the case, and could not know whether her name had or had not been entered in the decree, and

⁷³ 31 Ohio, 247.

⁷⁴ 20 N. H. 200.

⁷⁵ 31. Jud. 243.

⁷⁶ *Stagers v. Brent*, 33 Am. Rep. 317.

Brittain v. Mull, 6 S. E. R. 382.

Dickerson v. Davis, 12 N. E. R. 145.

Monroy v. Dewey, 19 N. E. R.

Heard v. Back, 31 Mo. 610.

Johnson v. Taylor, 32 Am. Dec. 69.

Weaver v. Brannan, 21 Atl. R. 1010.

Swanwick Machine Co. v. Walker, 22 N. H. 457.

XVIII W. R. 20.

no doubt, before the defendant can take advantage of the fact of her name appearing in the decretal order, he must be prepared to show us in what way the plaintiff came again on the record as a defendant, notwithstanding the absolute prohibition by this Court." It was also provided by an illustration in Bill No. III of Act X of 1877, that "a person whose name is introduced as a party on the record by fraud and without his knowledge is not a party unless he has given his consent to it before judgment." The illustration was, however, omitted along with all others apparently as unnecessary.

76. A person who has been impleaded in a suit merely for the sake of form will be a party to the suit, *Pro forma* defendant is a party. so as to be barred by a decision therein, and it is sometimes mainly with that object that a person is made a party. In *Deokee Nundun v. Kalee Pershad*,⁸² it was contended that a decision in a former suit was not *res judicata* as against a plaintiff in a subsequent suit, because "though he was a defendant in that (former) suit he was not a principal defendant, but was only made a defendant *chtiatan* (*pro forma*), and that the whole tenor of the plaint shows that the claim was made against the principal defendants, and not at all against the precautionary defendant," but a Division Bench of the Calcutta High Court held that, that contention could not be upheld. Phear, J., in delivering the judgment of the Court said, "the decree in any suit must be treated as an adjudication of right, as between the plaintiff on one side, and the defendants collectively and severally on the other, except, only so far as the decree itself contains any modification or reservation in regard to any of the individual defendants. . . . And, in this respect a defendant brought in *pro forma* is in exactly the same situation as any other defendant".

In *Ramtanu v. Komal Lochan*,⁸³ a suit against a surety on his security-bond, was held to be not barred by a previous suit against the principal debtor to which the surety also was a party. In support of that view, Norman, J., no doubt observed that the surety had been, and could have been, treated only as a nominal party to the former suit. The main ground of the decision, however, was that no issue was raised as to his liability, and no decree was passed against him. Nor is the decision in *Nobin Chunder v. Mookta Soonduree Debee*⁸⁴ against that

⁸² VIII W. R. 361.⁸³ III B. L. R. Ap. 37.⁸⁴ VII B. L. R. Ap. 35.

view. In that case G. brought a suit for his half share of the estate, making his brother N., who though entitled to the other half was unwilling to join in the suit, a co-defendant, and it was held that a dismissal of that suit on the merits would not bar a subsequent suit by N. for his half share. Norman, O. C. J., in delivering the judgment of the Court, said:—"N. was no party to the suit brought by his brother G. He could not in any manner have availed himself of a decree in that suit to enforce a claim to the share which he now claims. He could not have appealed from that decree, and we think it perfectly clear that he is in no way bound by the findings of the Court therein. . . . One of the brothers, against the will of the other, who thinks that they have not had time to sift out the facts of the case thoroughly so as to be able to place them before the Court satisfactorily, rushes into Court, and takes his chance of a decision as regards his share. The one who does not join gets no advantage from that suit. . . . He has a perfect right to stand by and watch the conduct of the litigants in that suit, with a view to assert his own rights at the time and in the manner which he shall judge most prudent and convenient to himself." N., would, under the general rule, have been barred however by the decision in regard to any issue in any subsequent suit as to G.'s half-share, and the High Court did not say anything against that. In *Brojo Behari Mitter v. Kedar Nath*,¹¹ U. claiming to be entitled to a certain tank as a tenant of B., sued to recover its possession against K, making B. a *pro forma* defendant; and the suit was dismissed, it being declared that B. was not to be deemed the owner of any portion of the tank; and this decision was held not to bar a subsequent suit for the same tank by B. against K., "as the conduct of the suit was not in his (B.'s) hands, and if it had been abandoned by the plaintiff so as to cause it to be dismissed, it could not reasonably be held that this suit was barred." The decision in this case did not proceed on the ground that B. was merely a *pro forma* defendant, and might be justified on the ground that B. and K. were co-defendants, and therefore arrayed on the same side in the suit.

Nor is the decision of their Lordships of the Privy Council in *Ratimbhoy v. Turner*,¹² against the general rule. They only

¹¹ I. L. R., XII (al. 360).

¹² I. L. R., XVII Bom.

held in that case; that a person impleaded as a party in a suit for the purposes of discovery merely, was not a party to the suit so as to be bound or protected by a decree made in it; and in delivering their Lordships' decision, Lord Hobhouse after referring to the irregularity of the proceeding, observed that—"R. was made a party expressly, as the order termed it, for the purpose of discovery only, but he was not treated as a party. There was no decree against him; he was dispensed from attendance unless and until the plaintiff gave him notice, and the Court has never made any order about his costs." The correct rule relating to such cases appears to be laid down in *Louis v. Brown*,⁷ in which the United States Supreme Court said:—"It is said that Corcoran and his co-trustees the Canal Company and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had. The answer is, that in Chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the Court and passed upon by its decree."

77. It is a general principle, however, that a decision in a suit does not operate as *res judicata* against all the parties to the suit, but only against those between whom the matter adjudicated upon was in issue. In *Zamindar of Pittapuram v. Kolanka*,⁸ the former suit was for several items of property with one of which the defendant widow's co-defendants were alleged not to have any concern; and in a subsequent suit for that particular property those

Decision on an issue is
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former suit.

co-defendants were deemed not to have been parties to the former suit. It is held by the American Courts also, that where in any suit an issue is joined between some of the parties only, the decision of the issue has no binding force against the others.⁹⁰ It is on the same principle, that parties to a suit are held not to be bound by a decision in it, in a subsequent suit between them, unless they were at arms length and on opposite sides in the former suit; and a decision in favor of a person is held to be not *res judicata* against other persons ranged on the same side with him in the former suit. An issue in fact is, as a general rule, open to determination although a finding thereon has been arrived at between the parties in a former suit in which they both were defendants.⁹¹ This is on the broad ground that a judgment in a suit for or against two or more persons ordinarily determines nothing as to their respective rights and liabilities as against each other. Nor could any other course be ordinarily expedient, as generally the object of a suit is merely to dispose of the plaintiff's claim, and the defendants therefore are not allowed to appeal against each other; and to treat an expression of opinion in regard to their rights *inter se* as a decision would hardly be proper and equitable. In *Junna Singh v. Kamrunissa*,⁹² in which a claim for pre-emption was dismissed, it was held by a Full Bench of the Allahabad High Court that an appeal would not lie by a defendant vendor against the defendant vendee, from a finding in the judgment as to the validity of the sale in respect of which the pre-emption claim was advanced; and that that finding "would not bar an adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the validity of the sale-deed." In *Bhagwant Singh v. Tej Kuar*,⁹³ the decision in a former suit as to the defendants being joint *inter se* was held not to bar the trial of the issue as to their being joint in a subsequent suit by one of the defendants against the others; Mr. Justice Straight observing that, "In that proceeding the question whether the family was joint or divided was not determined among the defendants *inter se*, but simply as against the plaintiff; and it could only be *res judicata* against

Harvey v. Osborn, 7 Ind. 100.
Shagpat v. Raghupat, III L. R. 11.

y Chauri v. Bhooran Monun, XII W. R. 524.
Kholat Chunder v. Kishen Govind, XVI W. R. 128.
Chunder v. Nani Chandra, XVII W. R. 121.

Ali Ally v. Jaggat Chamlor, XXV W. R. 416.
Burouder Nath v. Brogo Nath, I. L. R. XIII

Harap Singh v. Jowahir Singh, XVI P. R. 66.
⁹² I. L. R. I (A) 132.
⁹³ I. L. R. VIII A. 91.

him or parties claiming under the same title."^d It has been often held in the United States also, that a judgment in favor of one defendant against a plaintiff determines nothing between the defendant and a co-defendant,⁹⁴ and that a judgment against A. and his sureties is no bar in an action between one surety and his co-sureties to recover of each his proportionate share of a judgment of amercement that had been collected of him. While it establishes the demand, it does not establish the liability of the sureties between themselves.⁹⁵ Dr. Bigelow observing, that a judgment against several defendants cannot determine the rights of the defendants *inter se*, says that—"if judgment be given against several co-contractors, and satis-

^d The decision in *Shoo Churn v. Fakera*,⁹⁶ is not against the general rule, because what was held as concluded in that case between the defendants was only the question of the plaintiff's title in dispute in the former suit. "There were two persons," said Sir Richard Garth, C.J., in delivering the judgment of the Court in this case, "who in the Court of first instance, desired to come in as intervenors, claiming certain shares in the property in question. The Court allowed them accordingly to intervene, and of course they had a right to contend, if they had thought fit to do so, that the plaintiff was not entitled to the whole of this property which he claims, but those defendants apparently did not think fit to press their case in the Courts below, and allowed judgment for the whole property to be given in favor of the plaintiff, without appealing to this Court. The present appellant, however, says that those intervening defendants may, at some future time, make a claim for their shares of the property as against him; and that as long as there is any uncertainty as to their title, it would not be right for us to confirm the decree of the Court below, giving the whole property to the plaintiff. In support of this argument, we are referred to a case decided by the Privy Council, *Pernassam v. Terar*,⁹⁷ That case appears to us to be totally different from the present. There the parties, who were said to be entitled to the property as against the plaintiffs, were not made parties to the suit; and the High Court, although there was good reason for supposing that those persons were really entitled, declined to try the question whether they were entitled or not, considering that as between the plaintiff and those persons, the question of title might be settled in another suit. The Privy Council, however, held that this was wrong. They considered that the plaintiff must succeed, if at all, upon the strength of his own title, and that as these other persons were not made parties to the suit (as they ought to have been), they might, in some future suit, recover *mesne* profits, not only as against the plaintiff, but as against the defendants who were *bona fide* purchasers for value, and had been in possession for many years. But that is, by no means the state of things here, because (for the purposes of this argument), it is admitted that the claimants of the property are before the Court. The plaintiff claims the whole property, and the intervening defendants have been allowed to come in and prove their title to any part of it. Having had this opportunity, they have not thought fit to press their case in the Courts below, or to appeal to this Court. Consequently, the defendant who is now appealing, is in no danger whatever of being sued by those two persons, because, as between him and them, the decree, which has been given, will be conclusive. It is true that in this case the Lower Courts have unfortunately said, that as between the intervening defendants and the plaintiff it does not matter which is entitled, because the intervening defendants may, at a future time, recover their shares as against the plaintiff. It may be, that by these observations of the Lower Courts, the intervening defendants may have been induced not to press their case or to appeal, as they otherwise would have done; and it is possible that if they should sue the plaintiff at some future time, they may find themselves in a difficulty. But that consideration does not affect the case of the defendant who is now appealing, as, between him and the intervening defendants, the decree in this case will be a conclusive bar."

⁹⁴ *Ostrander v. Hart*, 130 N. Y. 100.
Leaman v. Sample, 91 Ind. 236.
Green v. Ogden, 100 Ind. 20.
McCarty v. Vort, 16 Am. St. Rep. 100.

Denman v. Cook, 30 Ala. 1.
Denman v. Holcomb, 26 Ind. 1.
McCarty v. Parks, 18

faction is obtained by one of them, he cannot use the judgment as binding evidence against the others of their liability to him to contribute."⁹⁸

78. The mere circumstance of any persons having been formally arrayed on the same side in a suit is immaterial, however, and it is agreed upon now, that they will be estopped by a decision on a matter, which was actively in issue between them, and as to which they had an active controversy against each other. Thus Muttusami Ayyar and Brandt, J.J., held in *Venkayya v. Narasamma*,⁹⁹ that a decision in a former suit as to the defendants in that suit having been joint would be *res judicata* in a subsequent suit between them, as "although a plaintiff and a defendant may have been co-defendants in a former suit, a matter in dispute between them in a subsequent suit may have formed the subject of active controversy in the former suit so as to preclude them from raising the same question in the subsequent suit." So also in *Chandu v. Kunhamed*,¹⁰⁰ Sir Arthur Collins, C.J., and Handley, J., observed that "Defendant No. 1 under whom the plaintiff claims was a party, first defendant, to the former suit, but he was *ex parte*, and, therefore, the title of defendant No. 2 cannot be said to have been actively contested between the present Defendants Nos. 1 and 2 in that suit, so as to bring the case within the decision in *Venkayya v. Narasamma*;" and both these decisions were relied upon and followed by the same Judges in *Madhavi v. Kelu*,¹ with the observation that "there can be no question that in the former suit and the present case, the question whether the land in dispute was the property of the *tarwad* of the present plaintiff, then the second defendant, was the subject of active controversy between the present plaintiff and the then *karnawan* of the *tarwad*." In *Shadal Khan v. Aminullah Khan*,² Duthoit, J., said in delivering the judgment of a Division Bench of the Allahabad High Court, that—"both parties to the present suit were parties to the former one; and although in the former they nominally stood together in the same array, yet as a fact they were opposed to each other, S., being on the side and supporting the case of

⁹⁸ Big. Estop. 101.
⁹⁹ I. L. R. XI Mad. 204.
¹⁰⁰ I. L. R. XIV

¹ I. L. R. XV Mad. 204.
² I. L. R. IV All. 93.

his mother, the plaintiff, and A. being the true defendant in the cause." Similarly Cunningham, J., in delivering the judgment of a Division Bench of the Calcutta High Court in *Bissorup v. Gorachand*,⁵ said: "There can be no doubt, that though the present plaintiffs were joined as defendants in the former suit, they were practically supporting the case of the plaintiff and had the fullest opportunity of contesting the point which that suit decided, a circumstance which is proved by their being joined as respondents in the appeal. In these circumstances, the plaintiffs are debarred under Sec. 13 from now again contesting the same point with the parties to the former suit." In *Ramchandra v. Narayan*,⁶ West, J., in delivering the judgment of a Division Bench of the Bombay High Court said—"according to *Ramchandra Bhimaji v. Abaji Parashram*,⁷ it was contended this adjudication constituted *res judicata* amongst the then defendants that the property was joint estate. It was certainly held several years ago in the *Collector of Sholapur v. Nanav* that a Court ought, in some cases, to determine the rights of the defendants *inter se*. On this principle probably were founded the observations in *Venktesh v. Ganpaya*.⁸ Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group." This decision was approved of in the Punjab Chief Court by Rivaz and Beachcroft, JJ., in *Nehal Singh v. Chunda Singh*,⁹ in which in the prior suit, one of the four brothers had sued N. and his other two brothers for a fourth-share, and while the other defendants admitted the claim, N. contended that he had been excluded by his uncle, and was therefore entitled to half of the family estate, the plaintiff and the other defendants being entitled only to half the estate between the

three. The Punjab Chief Court had held in *Ghisa v. Runjit*⁹ also, that a decision as to a common question, such as the tenure of a village community, in a suit by one member of the community against the other members would not be a *res judicata* so as to bar a subsequent suit involving that same question between the defendants, unless the defendants were distinctly at issue on the point, and acted as opposite parties, and the order was made so as to affect the rights of the defendants among themselves. In *Phundo v. Jangi Nath*,¹⁰ B. sued P. the widow of D. and Bh. a step-brother of D. to recover the amount of a mortgage executed by D. from Bh. as the heir of D. and from the mortgaged property. He got a decree, and after certain proceedings in execution thereof, brought another suit against them for a declaration as to certain property being liable to be taken in execution as the property of his judgment-debtor Bh. The latter in both the suits claimed to be the heir of D. on the ground of his adoption by D., which P. denied; and a finding in favor of the validity of the adoption in the former suit was, apparently without any contention to the contrary, assumed to bar the re-opening of that question between P. and Bh. in the subsequent suit, even though they were co-defendants and therefore arrayed on the same side in both the suits.

The rule is in fact, of quite a general application. In England it was recognised in *Chamley v. Lord Dunsany*.¹¹ In *Cottingham v. Earl of Shrewsbury*,¹² Wigram, V. C., said:—“If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains.” So also, in *Keran v. Crawford*,¹³ Sir George Jessel, M. R., said:—“Where a plaintiff obtains a release against one or more defendants, and there are subordinate questions either necessary to be gone into to work out that relief completely for the benefit of the plaintiff, or necessary to adjust the rights of the defendants consequent on the relief so obtained by the plaintiff, the Court may, by enquiries in chambers,

⁹ P. R. No. 121.

¹¹ L. R. XV. 411, 727.

¹² See *supra* note 10.

¹³

13 611 D. 21

work out the equities between the co-defendants." Mr. Freeman speaking of the practice of the American Courts says,—“wherever the rules of practice permit defendants to make issues among themselves, and to have such issues determined and relief granted thereupon, they become adversary parties upon interposing pleadings setting forth their conflicting interests and calling for the granting of appropriate relief; and a judgment or decree determining such interests and granting or denying such relief is as conclusive upon them as if they had been plaintiff and defendant instead of co-defendants.”¹⁴

Mr. Black likewise says,—“an exception to the general rule arises in the case where conflicting claims to the ownership of the property are affirmatively made and set up in their answers by several defendants in an action. Here a Court of Equity, (and also under the Code Practice, a Court of mixed powers) may, by its judgment, determine the rights of such defendants among themselves, and such judgment will be equally conclusive, as between the defendants who appeared and litigated their claims, as in the case of a similar issue between the plaintiff and the defendants.”¹⁵ Mr. Vanfleet says,—“It is a settled law that, where a case is made out between the defendants on issues between the complainant and defendants, a Court of Equity will decide the rights of the defendants as between themselves without any cross-pleadings.”¹⁶

It appears to have been held in a number of cases¹⁷ by the United States Supreme Court that “in Chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree so far as it affects rights presented to the Court and passed upon by its decree.” The Illinois Supreme Court and the New York Supreme Court held the same in *Harmon v. Auditor of Public Accounts*¹⁸ and in *Parkhurst v. Berdell*,¹⁹ respectively; Earl, J., observing in the latter case, that “P. was a party to that action, and there was litigation between her and him as adverse parties, although both of them were defendants, and therefore whatever was adjudicated as between them estopped them as

¹⁴ Fr.

¹⁵ Bl. Jud. 716.

¹⁶ Law. Col. At. 805.

¹⁷ 104 U. S. 741

U. S. 162.

¹⁸ County of Hall, 112 U. S.

¹⁹ 5 Am. St. Rep. 502.

²⁰ 6 Am. St.

if the adjudication had been made in an action wherein one of them was plaintiff and the other defendant." The same has been held by the Missouri Supreme Court in *Nave v. Adams*,²⁰ in which Barclay, J., speaking of the co-defendants said that their interests were essentially adverse to each other, and the adjudication respecting them, upon the pleadings clearly raising such an issue, is as conclusive as though they had occupied the more formal positions of plaintiff and defendant as to that issue."²¹

79. A mere nominal, and not substantial, difference of parties in the subsequent suit, will not affect their identity or the application of the doctrine of *res judicata*.²² Thus the fact of a person being a party as a plaintiff or as a defendant is immaterial, and a decision in one suit is held to be *res judicata* in another, even if the plaintiff and the defendant in the former suit were respectively the defendant and the plaintiff in the latter.²³ Mr. Taylor says,—“It matters not in regard to the conclusive effect of a judgment, whether the plaintiff in the second action was the plaintiff or defendant in the first.”²⁴ In *Eastmure v. Lawes*,²⁵ a decision against the plea of a set-off by a defendant was held to bar a suit by the same defendant for the amount of the set-off against the plaintiff in the former suit. Smith, in his notes on the *Duchess of Kingston's case*, says,²⁶ that it appears from *Eastmure v. Lawes*, “as was indeed always clear on principle, that a verdict negating the right of a defendant stated in his plea, estops him in a subsequent action from asserting that right as plaintiff against the same party.” In the United States, Chief Justice Cooley, in delivering the judgment of the Michigan Supreme Court in *Barker v. Cleveland*,²⁷ said, that to constitute a judgment bar to another suit, “it is not essential that the parties should stand in the same relative position to each other. It would not be claimed by the plaintiffs, because they were plaintiffs in one suit and defendants in the other, therefore their judgment should not conclude them.”

²⁰ 28 Am. St. Rep. 421.

²¹ *Levitt v. Wolcott*, 95 N. Y. 212.

Goldschmidt v. Nobles Co., 37 Minn. 49.

Devlin v. Ottumwa, 53 Iowa, 461.

²² *Herm. Comm.* 94.

Abied Chunder v. Taruck Chunder, I. L. R. III Cal. 146.

Bemolasoondury v. Panchanra, I. L. R. III Cal. 795.

Bussan Lall v. Chundee Dass, I. L. R. IV Cal. 696.

²⁴ *Tay. Ev.* 1451.

²⁵ 5 Bing. N. C. 450.

²⁶ II Sm. L. C. 515. (8th. Ed.)

²⁷ 19 Mich. 230.

80. Nor is it an objection to the application of the rule of *res judicata* that the parties to the former suit included some who are not joined in the subsequent suit or *vice versa*. Mr. Herman points out that the fact that there were other defendants in the former suit, who are also bound by the decision and estopped from controverting the same fact, does not render the former decision any the less conclusive against any of the defendants in the subsequent suit.²⁸ Similarly, Mr. Freeman says,—"The former adjudication ought not to be any less conclusive on the adverse parties, A. and B., because other persons shared with them the advantages and disadvantages of the former suit. The matter could have been as efficiently litigated as though A. and B. were the sole parties in interest, and the opportunity for the settlement of their controversy having been so given, there is no reason why it should be re-opened."²⁹ Thus in *Larum v. Wilmer*,³⁰ the defendant in the subsequent suit was a party to the former suit, and the objection was that other persons were also parties to it, and the Court said, "That single fact alone constitutes no valid objection to the admission of the record." In *Ehle v. Bingham*,³¹ a purchaser of sheep brought a suit for damages for breach of warranty against the vendor, who had recovered in a prior suit from the purchaser and his surety the amount of a promissory note they had given for the sheep, notwithstanding the purchaser's plea of the breach of warranty; and the verdict on that plea was held to be *res judicata* in the subsequent suit by the purchaser; Edward, J., observing that "the mere fact that another person was sued with him ought not to deprive the defendant in this suit of the benefit of the former judgment." In *Gallaher v. City of Moundsville*,³² the former suit was brought by the plaintiff in the subsequent suit and three other persons, and Brannon, J. observed that—"the fact that others are concluded as well as they cannot enable the plaintiff to escape the effect of the decision."

As to the introduction of a new party in the subsequent suit the unanimity of opinion is not so general. Sir William DeGrey in the *Duchess of Kingston's case*, observed, "that a judgment against a co-contractor, a co-obligor, or co-partner

²⁸ Herm. Comm. 104.
²⁹ Fr. Jud. 295.
³⁰ 35 Iowa, 344.

³¹ 7 Barb. 491.
³² 36 Am. St. Rep. 942.

will not be evidence, where another is joined." Mr. Freeman says that—"this seems, in most cases, to be perfectly reasonable; otherwise the party now joined will either be benefitted by a decision which could not have prejudiced him if it had gone the other way, or bound by an adjudication which he had no opportunity to resist."³³ Thus where the former suit was by one of the promisees only and the subsequent suit by all the promisees, the former judgment was held to be rightly excluded, if the newly added plaintiff were entitled, though the other plaintiffs might be debarred.³⁴ On the other hand, where a suit was brought against some of the joint promisors and decided in their favor on the merits, the judgment was held to be *res judicata* in a subsequent suit against all the joint promisors.³⁵ If in the subsequent suit, there are additional nominal parties having no interests to be affected by it, their presence will not prevent the judgment in the former suit from operating as *res judicata*.³⁶ The contrary was contended for in *Mohidin v. Muhammad Ibrahim*,³⁷ but the Court over-ruled the contention, observing that—"otherwise every case of estoppel by judgment *inter partes* might be got rid of by introducing a man of straw as a plaintiff or defendant in the subsequent suit." The same view was taken by the Calcutta High Court in *Gopal Das v. Gopi Nath*,³⁸ in which Wilson and Okinealy, JJ., said—"Res judicata is a personal matter between the parties and so far as those parties are concerned, the question is concluded for ever. The fact that there are other parties in the suit, upon whom the former decision is not binding, cannot be a ground for holding otherwise." In *Girardin v. Dean*,³⁹ it was pointed out that if the rule were otherwise, "no matter how often a case be decided, the parties might renew the litigation by simply joining with them a new party."

81. The parties will be considered to be the same, only if they should be "litigating under the same title." In *Moidin Rowther v. Ellaya Chinidathil*,⁴⁰ the Madras High Court pointed out that these words in Sec. 13 did "not refer to the identity of the ground of action, but mean that the question must have been raised and decided in the same right, that is to say, in

Persons litigating otherwise than under the same title are not the same parties.

³³ *Pr. Jud.* 295.

³⁴ *Blackburn v. Crawford*, 3 Wall. 175.

³⁵ *French v. Neal*, 24 Pick. 55.

³⁷ 1 M. H. C. R. 20.
³⁸ XII C. L. R. 38.
³⁹ 40 Tex. 243.

the right of the parties to the second suit, and not in the right of a stranger whom they represented in the first suit as his executors or administrators, &c." In *Muhammad Din v. Rahim Gul*,⁴¹ Tremlett, J., in delivering the judgment of a Division Bench of the Punjab Chief Court said—"the plaintiffs in the two suits are acting in different capacities, as in the first, the present men were promoting with others a joint claim (of pre-emption) whereas now they proposed a private and exclusive title."

This reservation of the rule of *res judicata* is also of a general application. Speaking of the rule of Roman Law, Pothier in his work on Obligations observes that—"the third requisite to the *exceptio rei judicatæ*, is that the person who demands the same thing as before, should demand it in the same quality, and that the demand should also be made from the defendant in the same quality as before."⁴² That is, in fact, a familiar principle of the Modern French and other continental systems of law.⁴³ The Code Civil, in enunciating the rule of *res judicata* provides not only that the demand may be *entre les même parties*, but also *et formée par elles et contre elles en la même qualité*," and a claim by a person to a house in one's own right is held to be in a different quality from that made by the same person as his uncle's heir. There is a general agreement that the identity of quality : "*rattache à la théorie de la représentation, en ce que celui qui, après avoir agi dans une instance en son nom personnel, se trouve dans une autre le représentant d'un tiers, n'agit pas dans le deux procès en la même qualité, alors l'exception (de l'autorité de la chose jugée) n'est pas applicable, parce que, il n'y a pas identité juridique de personnes, c'est à-dire identité de personnes dans le sens attaché par la loi à cette expression.*"⁴⁴ The same reservation is recognized in England, and in all the countries whose jurisprudence is based on the English Law. Thus it was laid down in *Metters v. Brown*,⁴⁵ that "whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger." Mr. Freeman says,—“It is a rule of both the Civil and the Common law that a party acting in one right can neither be benefitted nor injured by a judgment for or against him, when acting in some other right,”⁴⁶ and further adds that, “if one is

⁴¹ 1886 P. R. No. 6.
⁴² 1. Pothier Obl. 533 (Evans).
 l's Code Civil, Art. 1351.

⁴³ See Chose
⁴⁴ 1 H. 2211
⁴⁵ 17. Jud. 292.

made defendant in an official capacity, the judgment will not bind him personally, and if made a defendant personally, it will not bind him officially."⁴⁷ Dr. Bigelow says,—“Judgments as a general rule conclude the parties only in the character in which they sue or are sued; and therefore a judgment for or against an executor, administrator, assignee, trustee, agent, or attorney, as such, presumptively does not preclude him, in a different cause of action affecting his own proper person, from disputing the special findings in the former cause.”⁴⁸ He further adds that—“appearing in an action as heir of A will not estop the party to claim the same property as devisee of A’s widow, or as a creditor having a lien.”⁴⁹ So also Mr. Hernan says:—“The general rule that a judgment is conclusive between the same parties, is not complied with, when the same person, though a party in both suits, is such in different capacities—in the one individually, in the other as administrator.”⁵⁰

The same has been held in several cases. Thus, it was held in *Rathbone v. Hooney*,⁵¹ that a judgment against a party sued as an individual would not be an estoppel in a subsequent suit in which he might sue or be sued in another capacity or character; as, in “the latter case he is in contemplation of law a distinct person and a stranger to the prior proceedings and judgment.” So the dismissal of a claim against an executor brought upon an agreement made by him will not bar a subsequent suit to charge him personally on the same agreement.⁵² . . . So also a judgment against a person in his wife’s lifetime in a suit to which she was not a party will not be *res judicata* in a suit by him as her administrator.⁵³ Nor is a judgment in a suit brought by the executor of a deceased partner against the defendant in his capacity as liquidator of the firm, a bar to another suit brought by the executor, against the defendant in his capacity of partner.⁵⁴ A judgment of foreclosure against a person in his individual capacity was held in *Landon v. Townshend*⁵⁵ not to bar the assertion by him of a claim to the equity of redemption as an assignee in bankruptcy; Andrews, J., saying: “To bind the estate of a bankrupt in the hands of his assignee by an adversary judicial proceeding, or by a judgment of foreclosure in a suit commenced after the bankruptcy, it is indispensable that the suit or

⁴⁷ Fr. Jud.⁴⁸ Big. Estop. 120.⁴⁹ Big. Estop. 121.⁵⁰ Herm. Comm. 94.⁵¹ 22 N. Y. 402.⁵² Hall v. Richardson, 22 Hun. 444.⁵³ Blakey v. Newby, 6 Munf. 64.⁵⁴ Blocomb v. DeLizardi, 99 Am. Dec. 740.
St.

proceeding should have been brought against the assignee distinctively in his representative and official character, or, at least, that it should in some way appear on the face of the proceedings that they related to or affected the bankrupt's estate, and that it is not sufficient that the assignee is individually named in the process or pleadings, without any averment of his representative character. 'This is in accordance with the general tenor of adjudication.'⁵⁶ A judgment against a sheriff for goods which he alleged to have taken under an execution in favor of A. and against B. is not *res judicata* in a subsequent suit against the same sheriff by the same plaintiff for taking the same goods under an execution in favor of C. and against B., as the sheriff is not the same party in regard to the interest in the two suits.⁵⁷ So also a person, who is a party to a suit on a deed in which he is interested as a beneficiary, will not be considered a party to it in his capacity of a trustee in another deed affecting the property in dispute in that suit.⁵⁸ A person suing as the heir of his mother is not bound by a decision against him in a suit in which he appeared as the heir of his father.⁵⁹

However, when all the interests of the party, in his several capacities, are before the Court in a suit, the reason of the reservation ceases, and he is bound in all characters. Thus, where an executrix, the widow of the testator, is sued in the former capacity only, but raises in her defence of the suit the issue of her rights as usufructuary, she will be personally concluded by the judgment, and cannot subsequently attack its validity on the ground that she was not a party in her individual capacity.⁶⁰ In *Carcoran v. Chesapeake Canal Co.*,⁶¹ an individual as trustee for certain bondholders, was brought before the Court, and a decree rendered against him as such, and it was held that he could not relitigate the same matter on the ground that he was himself a bondholder of some of the bonds, because as trustee in the former suit he was representing himself. In *Building and Loan Ass'n v. Chalmers*,⁶² Paterson, J., was in favor of treating the former judgment as an estoppel, but the majority of the Judges dissented, though their decision also proceeded on a rule of procedure, and Searls, C. J., admitted that a party might be before the Court in two or more capacities, and said, "It may well

⁵⁶ *Hubbell*, 65 Barb. 74.
⁵⁷ *Prentice*, 104, N. Y. 45.
 Holt, 111 U. S. 506.

⁵⁸ *Stoops v. Woods*, 45 Cal. 439.

⁵⁹ *McNutt v. Tregon*, 29 W. Va. 409.

⁶⁰ *Caruth v. Grigsby*, 57 Tex.

⁶¹ *Denegre v. Denegre*, 33 La. Ann.
Young v. Fabillon, 91 Pa. 81.

⁶² 94 U. S. 741.

⁶³ 7 Am. St. Rep. 173.

he that a party who voluntarily files an answer in a cause without an order of Court making him a party defendant, and who goes to trial upon the issues made by his answer to the complaint, will be concluded by the judgment rendered on the trial of such issues, and estopped from denying that he was a party to the action." On the same principle, a decree in a suit brought by an executor in his own right, but to which he was a necessary party as executor, and in which the rights of his testator are adjudicated, is conclusive between the administrator *de bonis non* and the other parties to it, and cannot be re-examined in a subsequent suit between them.⁶³

82. It has been already observed that a decision on a matter in issue in a former suit is *res judicata* not only against the parties to that suit, but also against those who or any of whom claim under them. This rule is of ancient origin, and has, in fact, been generally recognized in a much more extended form. It was familiar law among the Romans—*eadem esse personæ non ipsi modo intelliguntur inter quos judicium actum est, eorumque hæredes, litiumque domini, verum et singulares successores, quin etiam extranei, tum quidem cum vel tacite liti consenserunt, vel reapse ac sua ipsius natura res in judicium deducta penitus consumpta est, vel ex singulari jure consumpta esse videtur*. The French Jurists take a still broader view, designating the grounds of the extension of the doctrine of *res judicata* to persons other than the parties to a suit, as natural and positive. Under the former they include all those *fondées sur les principes généraux de la représentation d'une personne par une autre, ou de la succession tant universelle qu'à titre particulier*, classifying them as resting respectively on the principles (a) *d'un mandat légal, conventionnel ou judiciaire*; (b) *de la gestion d'affaires*; (c) *de succession*. Positive extensions embrace all special dispositions of positive law, and are distinguished into two classes, the first comprising "*des cas qui ne se rattachent qu'indirectement aux principes de la chose jugée; en ce sens que, si les jugements obtenus contre une personne sont indistinctement opposables à toutes, c'est moins par dérogation aux principes généraux que nous venons de poser sur la nécessité de l'identité de parties, que par voie de conséquence d'une disposition de la loi qui réserve exclusivement à une ou*

⁶³ *Manigault v. Holmes*, 1 Hall.

*plusieurs personnes déterminées l'exercice de certaines actions. The second class comprises les cas où les nécessités pratiques de certaines institutions forcent à considérer une personne comme représentée par une autre, alors cependant qu'aucun lien de mandat ni de gestion d'affaires ne les unissait entre elles.*⁶¹

It is a general proposition of the English law also, that a decision binds even the privies of the parties. Lord Coke, in his quaint language, said,—“the lord by escheat, the tenant by the curtesy, the tenant in dower, and the incumbent of a benefice, shall be bound by and shall take advantage of estoppels.”⁶² These all are instances of privies in law, but the same is true of privies in blood and of privies in estate. As observed by the Alabama Supreme Court in *Woods v. Montevallo C. and T. Co.*,⁶³ “where one claims in privity with another, whether by blood, estate, or law, he is in the same situation with such person as to any judgment for or against him.” The classification of privies has no importance for the rule of *res judicata*, as the mode of the creation of the relation of privity does not extend or limit the operation of the bar by a decision, and is therefore immaterial. The rule applies equally where the person to be bound is two or more steps removed from the record party who constitutes his source of title, provided no new title has accrued in his hands; and tenants who enter under other tenants, on whom notice in ejectment has been served, will be concluded by the judgment.⁶⁴ Privies, it has been said, “are those who claim under or in right of parties, or who stand in mutual or successive relationship to the same rights of property.”⁶⁵ Privies are held “bound because they have succeeded to some estate or interest which was bound in the hands of its former owner; and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest. . . . It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit.”⁶⁶ It has even been formally enacted in some of the states that a judgment is conclusive only “between the parties and their successors in interest by title subsequent to the commencement of the action.” Dr. Bigelow says—“The ground of privity is property and not personal relation. To make a man a privy to an action

⁶¹ Lac. Chose Jugée, 151.
⁶² Co. Litt. 363 A.
⁶³ 3 Am. St. Rep. 303.

Smith v. Traub's Heirs, 1 McL
⁶⁴ 3 Am. St. Rep. ---
⁶⁵ Pr. Jud. ---

he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party, subsequently to the action."⁷⁰ Mr. Herman says—"As a successor is entitled to the benefit of a judgment in favor of the person under whom he claims, a judgment against the latter may *vice versa* be opposed to the former, provided the title has only vested subsequent to the proceeding in which judgment was rendered."⁷¹ . . . An assignee is bound by a judgment against the assignor prior to the assignment."⁷² A vendee or assignee will not be concluded by a judgment against the vendor or assignor subsequent to the sale or assignment.⁷³ It is quite a general rule, in fact, that to create the relation of privity, the person to be bound by the judgment must be one who claims an interest in the subject affected through or under one of the parties, and he must claim it as acquired after the rendition of the judgment.⁷⁴ It was held in *Hunt v. Haven*⁷⁵ that "one cannot be a privy in estate to a judgment or decree unless he derives his title to the property in question subsequent to, and from some party who is bound by, such judgment or decree."⁷⁶ Thus a mortgagee is in privity with a mortgagor as to all that happened before the execution of the mortgage, and not in regard to anything happening afterwards. A tenant of the defendant in ejectment, who acquired his lease before the commencement of a suit is not estopped as to his term by a judgment in the suit against his lessor.⁷⁷ An assignee is not bound by judgment in a suit by or against the assignor, instituted after the assignment was made, though it might have been different if the judgment had preceded the assignment.⁷⁸ Nor is a grantee of land affected by a judgment concerning it in a suit instituted against his grantor by a third person after the grant.⁷⁹ The decision in *Cooper v. Corbin*⁸⁰ is not against this view, as it was only held in it, that—"where a transfer is involuntary, as where it is made by virtue of an execution, judicial or trustees' sale, it takes effect by relation as of the date of the lien or trust-deed under which the sale was made, and cannot be affected by any judgment against the latter in a suit commenced after that date." Nor is the

⁷⁰ Big. Estop. 142.

⁷¹ Herm. Comm. 166.

⁷² Herm. Comm. 208.

⁷³ *Bensinger v. Fell*, 29 Am. St. Rep. 774.

⁷⁴ *Calderwood v. Brooks*, 28 Cal. 151.

Thompson v. Clark, 4 Hun. 164.

Orthwein v. Thomas, 11 Am. St. Rep.

23 N. H. 102.

⁷⁵ *Cook v. Parham*, 63 Ala. 468.

Shattuck v. Bascom, 103 N. Y. 30.

⁷⁷ *Batterlee v. Bliss*, 26 Cal. 450.

⁷⁸ *Powers v. Heath's Adm'r.*, 21 Mo. 319.

⁷⁹ *Cole v. Allen*, 64 Ala. 94.

Hume v. Franzen, 23 Iowa. 25.

Barbero v. Real E. S. B., 10 Mo. App. 76.

⁸⁰ 105 Ill. 234.

rule peculiar to the American Courts. It was familiar law among the Romans. It is unanimously agreed to by the French jurists. It is recognized and acted upon by the English Courts also. Thus Mr. Justice Littledale in *Deo v. Earl of Derby*.⁸¹ said: "A passage has been cited from Comyn's Digest, Evidence A. 5, where it is said, that 'a verdict in another action from the same cause shall be allowed to be evidence between the same parties. So it shall be evidence when the verdict was for one under whom any of the parties claim.' But that must mean a claim acquired through such party subsequent to the verdict."

83. The Indian rule has also been interpreted in the same way, the claim contemplated in the rule as enacted in Sec. 13 being taken to be that on a title acquired subsequent to the prior decision set up as a *res judicata*. The Punjab Chief Court has recently

taken that view in *Madu v. Umardin*⁸² in which Riwarz, J., said that "the words parties under whom they or any of them claim can only refer to a title which had not come into existence at the date of the former suit." Mahmood, J., in *Sita Ram v. Amir Begam*⁸³ said—"he who takes under another, is not bound by any acts which that other does subsequent to the grant. . . . It is upon the same principle that no estoppel incurred after the mortgage, and no conclusive adjudication as the result of a subsequent litigation by which the mortgagor is bound, can affect the rights of the mortgagee. . . . Hypothecation or simple mortgage, as understood in this country, is a species of what are known as *jura in re aliena*, that is, estates carved out of full ownership, and that when such an estate has once been created the mortgagor cannot represent it in any subsequent litigation. . . . The estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; for the simple reason that a decree of Court in such cases can neither create new rights, nor take away existing ones, but can only enforce the rights as they stand between the parties, and in enforcing such rights, cannot go beyond the rights of the parties to the litigation." The same has been held again by the Allahabad High Court in *Niazulla Khan v. Nazir Begam*,⁸⁴

⁸¹ 1 Ad. and Ell. 708.
⁸² 1893 P. R. No. 26.

⁸³ I. L. R. VIII All. 326.
⁸⁴ 1893 All. W. N. 240.

and by the Calcutta High Court in *Dooma v. Joonarain*.⁸⁵ In the latter case, Mr. Justice Mitter, in delivering the judgment of the Court, said :—" The decisions of the 18th July and 6th October 1866 were passed in a suit which was instituted long after the date of the plaintiff's mortgage ; and the plaintiff, who was not a party to that suit, cannot, therefore, be bound by any decision which was passed in that case." This decision was, though doubted, yet followed by Markby and Prinsep, JJ., in *Bonomalee Nag v. Koylash Chunder*,⁸⁶ in which it was held, " that a mortgagee (the auction-purchaser of the mortgaged property) not in possession is not barred by a decision (delivered before the sale, but after the mortgage), affirming a right of way in a suit between a third party and the mortgagor, from suing to declare that there is no such right of way, he having no knowledge of that suit, which was, however, decided without any collusion between the parties to it." Prinsep, J., added,—" We cannot, I think, hold, that a mortgagor in possession so far represents the entire estate as to affect the right of a mortgagee." In *Krishnaji v. Sitaram*,⁸⁷ a decision in a suit against a mortgagor subsequent to the mortgage was pleaded as a *res judicata* against the mortgagee, and Sir Michael Westropp, C. J., in delivering the judgment of the Court, said,—" The acts of S. (mortgagor) antecedent to the mortgage by him to the plaintiff would bind the latter, but the acts of S. subsequently to the mortgage do not bind the plaintiff."

84. Nor will a suit between the representatives of any one party be " between the same parties or parties under whom they or any of them claim." It was on this account that a finding as to the existence of an adoption between the parties to a suit was held in *Vythilinga v. Vijayathammal*,⁸⁸ to be not *res judicata* between the co-heirs of the party who had denied the adoption. Hutchins, J., pointed out in *Thanakoti v. Muniappa*,⁸⁹ that the words " any of them " in the rule " refer to any of the parties claiming under any party bound by the former proceeding."

85. As to when one party can be said to claim under another, it may be broadly observed, that a person is not deemed to claim under another, if in fact he does not claim under that

⁸⁵ XII W. R. 363.
⁸⁶ I. L. R. IV Cal. 606.
⁸⁷ I. L. R. V Bom. 496.

⁸⁸ I. L. R. VI Mad. 43.
⁸⁹ I. L. R. VIII Mad. 496.

other, though he might have done so, and his interests were almost identical with that other's.⁹⁰ The question as to the exact cases in which he can be said to so claim is one of substantive law, and a different view has been taken of it in different countries. Brief reference will be made here to such aspects of the question as have come before the courts in countries governed by the English system of jurisprudence with reference to the doctrine of *res judicata*. They are rather of a negative character as comprising mostly of cases in which persons standing in certain relations to others have been held not to claim under those others, but they are particularly important in connection with the question of *res judicata* as notwithstanding that, the said persons have been held usually estopped by judgments against those others, almost as if they claimed under them, on a ground analogous to, if not the same, with that of *res judicata*—on the ground not so much of privity as of representation—on a ground requiring, besides the usual essentials of *res judicata*, that the decision in the former suit must have been obtained in good faith and without collusion. Such cases are distinguished from those of succession and assignment in almost every system of jurisprudence. Lacombe, in speaking of the French Law, says that it is necessary not to confound *les ayant cause d'une personne avec ceux qui, sans rattacher en aucune manière leurs droits aux siens, ne lui succèdent qu'en ce qu'ils ont tous eu en des temps successifs des droits identiques sur la même chose*. The Indian Statute Law does not make any provision directly for such cases, and therefore they are usually decided on such general principles of equity and justice as have been established by the decisions of the English Courts. The condition as to the absence of *mala fides* in the first suit is, however, not peculiar to the English system of jurisprudence. It was recognized expressly in the Roman Law. Lacombe mentions it as a *principe incontesté* that all that has been said on the subject of the representation of one person by another is subject to the condition *que le représentant aura agi de bonne foi et sans collusion*; and says:—*Tous les auteurs, et ils n'ont fait en cela que suivre des règles déjà posées par le droit romain, ont fait exception aux principes généraux de la représentation, lorsque le jugement n'a été obtenu que par dol et par suite d'une collusion entre le représentant et son adversaire*.⁹¹

⁹⁰ *Spencer v. Williams*, L. R. 2 P. & D. 230.⁹¹ *Loc.*

86. Thus as a general rule the collateral heirs of a male are held, after his widow's death, not to claim under her. For instance, the Punjab Chief Court said in *Fatteh Singh v. Hakim Singh*⁹² that "in regard to the question whether the plaintiffs claim in virtue of any title held by K. to the estate of her deceased husband, it is apparent that they claim as heirs to her husband, and her interest merely delayed those rights if those rights existed, but her rights are distinct from those of the present plaintiffs, who cannot be said to claim by, under, or through her. The widow takes in a manner that in no way identifies her interest with the heirs', so that, although it is true that the proved adoption of F. would have defeated her claim to succeed to her husband, no less than it would defeat the claims of her husband's heirs, this identity of interest in regard to a danger common to both must not be confounded with privity in estate. And if in such a case as this, the person alleging adoption after having disputed this question with the widow cannot again dispute it with her husband's heirs, when it has been decided against him in a suit between him and the widow, then also neither could the heirs dispute that question, if in a suit brought by or against the widow it had been decided in favor of the person alleging adoption. But in the latter case, there would be obvious danger of collusion. Accordingly it appears both on the application of the abstract rule, and on the ground of practical convenience, that there is no estoppel." The general rule appears to be that the collaterals will be barred by a decision in a suit to which the widow is a party, if the decision in it were real and not fraudulent and collusive. The principle on which this is based was explained clearly in *Ahmedbhoy v. Vulleebhoy*,⁹³ by Latham, J., who cited both English⁹⁴ and Indian⁹⁵ cases in support of it.

* On the same principle, the following illustration was introduced into Bill III. of Act X of 1877, though finally omitted along with all other illustrations added to Sec. 13. "(c) On the death of A, a Hindu, B takes possession of A's land, claiming to hold it as A's adopted son. A's widow, C, sues B for possession as widow. B pleads the adoption. The Court finds that B was not adopted and decrees in favor of C. On C's death, A's collateral kindred take possession of the land. The former decree does not bar a suit by B against them for possession as A's adopted son for the collateral kindred do not claim under C."

⁹² 1874 P. R. No. 83.

⁹³ I. L. R. VI Bom. 703.

⁹⁴ *Earl of Brandon v. Becker*, 3 Cl. and F. 510.
Earl of Egremont, 6 Q. B. 587.

⁹⁵ *Gopi Wasudev v. Markande*, I. L. R. III Bom. 33.

Narayan v. Pandurang, I. L. R. V

The leading case on the point is that of *Katama Natchiar v. The Rajah of Shivagunga*.⁹⁶ Lord Justice Turner, in delivering their Lordships' judgment in that case, said:—"Unless it could be shown that there had not been a fair trial of the right in that suit (against the widow), or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to A. (the first widow). For assuming her to be entitled to the zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." These words were quoted with approval by their Lordships of the Privy Council in *Pertabnarrain Singh v. Triloknath Singh*,⁹⁷ in which the widow claimed under a will of her husband, and her estate being held to be "at least as large as that of a Hindu widow in her husband's property," the minor son of her husband's brother, to whom she had devised the estate, was held to be represented by her in a suit by her husband's daughter's son, and to be estopped by a decision passed in that suit as to their respective titles to the estate. The same rule was followed in *Nand Kumar v. Radha Kuari*,⁹⁸ in which Sir Robert Stuart, C. J., and Oldfield, J., held that—"a Hindu widow succeeding to her husband's estate as heir represents the estate fully, and reversioners claiming to succeed after her are bound by decrees relating to her husband's estate obtained against her without fraud or collusion." Straight and Mahmood, JJ., also adopted that rule in *Sant Kumar v. Sukh Nidhan*,⁹⁹ and in *Sachit v. Budhua Kuar*,¹⁰⁰ Mr. Justice Mahmood, observing in the former case that,—“it is perfectly true, as was held by this Court in *Nand Kumar v. Radha Kuari*, that where, on her husband's death, a Hindu widow obtains possession of his estate as his heir, in a suit against her for possession thereof by certain persons claiming to succeed to the estate as rightful heirs, a decree obtained by them would be

⁹⁶ IX N. I. A. 608.
⁹⁷ L. R. XI I. A. 207.
⁹⁸ I. L. R. I. All. 252.

⁹⁹ I. L. R. VIII All. 265.
¹⁰⁰ I. L. R. VIII All. 420.

a bar to a new suit against those persons by the claiming the estate in succession to the widow; in other words, such a decree would operate as *res judicata* against all who, in the order of succession, came after the widow, and in that sense may be dealt with as her representatives. But the peculiar nature of the widow's estate under the Hindu Law is such that her position in litigation must necessarily be subjected to the qualification which the ruling which I have just cited imposes upon the operation of such a plea in bar of the action, namely, that the decree should have been fairly obtained against the widow in a *bond fide* litigation." The same view was taken by the Madras High Court in *Arunachala v. Panchanadam*,¹ in which it was held that the dismissal of plaintiff's claim as adopted son against a widow would bar a subsequent suit against the reversioners, even if the widow after the dismissal executed an agreement acknowledging his right as adopted son; and Sir Charles Turner, C. J., said:—"The widow represented the estate, and if she defended the suit *bond fide*, the decision whether allowing or disallowing the right claimed would have bound all persons claiming in succession to the widow." The same rule has been held in *Fattch Khan v. Baz Khan*,² to apply even to a Mahomedan widow taking under custom only a life estate like a Hindu widow, Roe, J., having said that the contention, "that a widow in possession of an estate, though only herself holding on a life interest, is a representative for the purpose of binding all future heirs on matters which may be decided after a full and fair trial in *bond fide* litigation between her and third parties" was not disputed as regards Hindu widows. The decision in *Nugenderchunder Ghose v. Kaminee Dossee*³ is not against that view, as it turned on another point, and the widow was in that case charged "with having sought to destroy the estate by causing it to be sold for arrears of revenue," and Lord Romilly, in delivering their Lordships' judgment, said that,—“their Lordships wish it to be understood that they leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest.” It was chiefly with reference to this decision, that a remand was ordered in *Brammoye Dassee v. Kristo Mohun*,⁴ on account of the peculiar circumstances of the case,

¹ I. L. R. VIII Mo. 1. 24.

² 1890 P. R. No. 120.

³ XI M. L. A. 241.

⁴ I. L. R. II Cal. 232.

for an enquiry as to how the prior decree set up as a *res judicata* was obtained; Markby, J., having in delivering the judgment of the Court observed, that "there was in the present case not an absolute bar such as there would have been, if this were the case of a decree against the person through whom the plaintiff claims. The rule that a decree against the widow binds the reversioner is subject to this qualification, that there has been a fair trial of the right in the former suit." It is on the same principle, that a suit has been held to lie to set aside a sale of the deceased husband's property in execution of a decree for the husband's debts against the widow.⁵

This view is the same as that held in England, with regard to successive remaindermen, a decision against a remainderman being admissible in evidence against a subsequent remainderman in a suit brought against him for the same land, though he cannot be said to claim any estate under the first remainderman, because they all claim under the same deed.⁶ In the United States of America it has been held in several cases that remaindermen are not bound when they are not parties,⁷ but even there it appears to be an established rule that if there are ever so many contingent limitations of a trust, it is sufficient to bring the trustees before the Court, together with him in whom the first estate of inheritance is vested, and all that come after will be bound by the decree, though not in case, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested.⁸ The Maryland Supreme Court⁹ held that to constitute a bar it was necessary to bring before the Court some person having an estate of inheritance who might on that account be entitled to represent also the interests of those claiming after his death. The weight of authority, however, is in favor of the view that if there be no person entitled to the inheritance, it is sufficient to implead the tenant for life; and Lord Redesdale in *Giffard v. Hort*,¹⁰ said that it had been repeatedly determined "that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the Court before he has issue, the contingent remaindermen are barred."¹¹ It may be observed, however, that neither there nor in England is any privity

between a tenant for life and a reversioner.

⁵ *Kishen Bullub v. Rogheonundun*, VI W. R. 403.

⁶ *Panch Ranchore v. Bai Vahhat*, L. L. R. XI Bom. 118.

⁷ *Pyke v. Crouch*, L. Ld. Raym. 730.

⁸ *Lambert v. Blodgett*, 10 A. W. R. 414.
Troyer v. Wood, 9 Am. St. Rep. 387.

Allen v. DeGroodt, 14 Am. St. Rep. 626.

⁹ *Goebel v. Ida*, 111 N. Y. 170.

Mayer v. Hoyer, 81 Ga. 308.

¹⁰ *Downin v. Sprecher*, 35 Md. 478.

¹¹ 1 Sch. & L. 407.

¹² *Bullers* N. P. 232 (c).

87. Somewhat resembling the case of a widow is that of the *Shebait* of an idol. He can hardly be said to claim under his predecessor, but a decision against a *Shebait* is binding on his successor. On the authority of *Juggut Chunder v. Kishwanund*⁹ this was held directly in *Kisononund v. Nursingh Doss*,¹⁰ the decision in which case was in its turn followed in *Golab Chand v. Prosonno Coomary*.¹¹ The decision in this last case was, on appeal, affirmed by their Lordships of the Privy Council,¹² who after observing that a *Shebait* may incur debts or borrow money for necessary purposes, said: "It appears to be right and reasonable that judgment so obtained against a former *Shebait* in respect of debts so incurred should be binding upon succeeding *Shebaits*, who, in fact, form a continuing representation of the idol's property. . . . Before, however, applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them." A decision in a suit against a *Vatandar* has been held by a Full Bench of the Bombay High Court, to be *res judicata* against a succeeding holder of the *Vatan*.¹³ The same view has been taken by the Madras High Court. Thus in *Venkayya v. Suramma*,¹⁴ it was contended that "the emolument attached to an office is in the nature of a salary assigned to that office, and is either no property at all or at least public property, and that each *karnam* acquires a fresh right to enjoy the emolument on his appointment, and is entitled to enforce it by a new suit, though his predecessor in office might have sued in respect of the same cause of action and failed." Sir Arthur Collins, C. J., and Muttusamy Ayyar, J., said, however:—"We are unable to accede to this suggestion, for, when land is held on a service tenure it does not cease either to be property or private property. . . . The suit brought by the appellant's father was brought in the interest of all future successors consequent on the jural relation between the office and the land, and the decision passed therein is, therefore, binding on the appellant." In *Shivalingaya v.*¹⁵ a priest having died, his property pending a

⁹ 11 Bong. S. D. A. Sel. Rep. 160.

¹⁰ 1 Marsh. 443.

¹¹ 11 B. L. R. 332.

¹² *Prosonno Kumari Debbar v. Golab Chand L.*
R. 111 A 145.

¹³ *Radhaba v. Anantav*, I. L. R. IX

¹⁴ I. L. R. XII Mad. 235.

I. L. R. IV Bom. 247.

settlement of the right of succession was placed under the Nazir's management. A suit by Sa. for a declaration of his right of ownership to it against N. resulted in a compromise, embodied in a decree, dividing it between him and the defendant in certain shares. On the Nazir's refusal to deliver the property to them, N. got a decree against the Nazir for the whole of the property and recovered it from him. Sh. as the representative of Sa. had also sued the Nazir for the whole of the property, but having his suit dismissed, sued N. for the shares decreed in accordance with the compromise. The suit was held barred. It was contended that N. was not a party to the suit against the Nazir, but West, J., said "the truth is, that he was a party, being, as the true successor, or *prima facie* successor, represented in that suit by the Nazir. It is not open to those who have as heirs sued the official representative of an estate and failed, to sue the owner, when ascertained, a second time on the same right. Though the defendant's right was undetermined, it subsisted during the previous suits, and was effectively represented at the cost and risk of his estate. . . . The more recent decree, which pronounces Sh. not entitled to any of S.'s property, has superseded the earlier one, which ineffectually awarded Sa. a moiety of that property as against a person not in possession; and while that decree stands unreversed, another decree cannot be made, awarding to the same Sh. one half of the same property in the same right as against N. whom the Nazir in the earlier suit represented." In the American Courts, it is usually held, that a successor is in privity with his predecessor. "The successors of the parties—those who succeed to their rights" says Mr. Herman "are regarded the same as the original parties, therefore a judgment for or against a corporation or its officers has the same effect as *res judicata*, as it had with those whom they succeeded." A judgment for or against the incumbent, concerning the rights and privileges of his office is admissible as evidence for or against his successors.¹⁶

88. A son in an undivided Hindu family, except in Lower Bengal, does not claim under his father. This was held in *Ram Narain v. Bisheshar Prasad*¹⁷ in which Sir John Edge (with whom Mahmood, J. concurred) said—
 A son in an undivided Hindu family does not claim under his father.
 "The Hindu son in a joint family, becomes entitled by reason of his birth and in his own right, a right which he can enforce

Bonker v. Atkyns, 8 Kin. 15.
 Snell v. Campbell, 24 Fed. Rep. 880

¹⁷ 1. L. R. N. A. 11. 411.

against his father. A person is said to claim under another when he derives his title through that other by assignment or otherwise. We have also been pressed with cases in which it has been held that a decree obtained against a Hindu father for a debt, is binding against the other members of a Hindu family. Those cases are not analogous to the present. They depend more on the obligation of a Hindu son to pay his father's debts not improperly incurred, and upon the presumption in some of those cases that the action was brought against the father as the representative of the family and the family property."

89. Co-heirs are held not to claim under each other.

Co-heirs do not claim
under each other. This was expressly recognized by Paulus when he said—*"Si cum herede actum sit tamen et cum ceteris*

rei putatur et proterit, nam et

eis vertitur, tamen personarum

cum quibus iugitus suo nomine agitur aliam atque aliam rem

This is the present rule also. Thus in *Walker v. .*¹ the Supreme Court of Georgia said,—“each of these grandchildren was entitled, in his own right, to his share of his ancestor's estate, and to contest any conflicting claim. They do not claim through one another. Therefore a judgment against a party did not prevent the rest from being heard.” Similarly, Mr. Herman says—“where a creditor has left several heirs, a judgment in favor of the debtor upon the demand of one cannot be made available against the others, it being as against them *res inter alios judicata* and a different thing; for the parts claimed by the other heirs, although parts of the same debt, are not the same parts which were previously litigated. It is otherwise when the thing due to several heirs or other co-proprietors is something indivisible, such as an easement or a right of servitude, for as this is not susceptible of parts or division, each is creditor or co-proprietor of the whole, and therefore the judgment upon the cause of action of any one of them is the same as the cause of action of the others, and is *eadem res*, and therefore it is not *res inter alios judicata* with respect to the others; from the indivisibility of their right they are regarded as the same party, and therefore the authority of the judgment extends to all. If it was in favor of their co-proprietor or joint-creditor, they are entitled to the benefit of it; if it was rendered against him they are bound by it, nevertheless.”¹⁹

90. That a co-owner is not bound by a judgment rendered against his companions in interest has also been held in several cases.²⁰ In *Williams v. Sutton*,²¹ the owners of the undivided three-fourths of the title to a tract of land were sued in an action of trespass for excavating a part of the land, and the question of title was adjudged against them, and the judgment was held not to bar a recovery by D., the owner of the remaining one-fourth. The Court said that as D., “by virtue of his ownership of an undivided interest, was, as against a trespasser, entitled to recover the whole tract, his rights in that respect could not be changed by a proceeding to which he was not a party; that notwithstanding the former judgment, the title of the defendant continued to be as it was prior thereto,—that of a trespasser; and finally, that there was no legal impediment to D’s recovering the entire tract, as he could have done before the judgment against his co-tenants.” This question was often discussed by Roman Jurists in connection with claims for servitudes, and a contrary view taken of the binding effect of a decision in a suit to which one of the joint-owners alone was a party in regard to the other joint-owners. Pothier said:—*lis etiam quasi inter easdem personas renovari videtur, si cum uno ex pluribus quibus aliquod jus individuum puta servitus, debebatur, aut qui eam debebant, res sit judicata, et cæteri litem instaurare velent; sed succurritur ipsis per actionem de dolo si collusum est, id est juxta illam ex variis glossar interpretationibus quæ magis placet, actionem pristinam, in qua, adversus exceptionem rei judicatæ, replicabitur de dolo.* The French Jurists take a rather peculiar view however in this case as well as in all other cases in which the principle of *la gestion d’affaire* is held to apply by them, a view which restricts the application of the doctrine of *res judicata* to the cases in which a judgment is in favor of the joint owners. Thus after explaining that proposition, Lacombe, says:—*Il ne nous paraît pas établi qu’au cas de perte du procès, la décision soit également obligatoire pour les autres.*²²

91. It is a general rule, that an executor and an administrator represent the deceased’s heirs relating to the deceased’s property. This is true even if there is any irregularity in their appointment. Lacombe after observing that

How far executors and administrators represent deceased’s heir.

the judgment obtained for or against *les curateurs à succession vacante engendrent l'exception de chose jugée pour ou contre les héritiers qui se présenteraient plus tard recueillir ces successions*: and qu'on ne saurait en aucun cas faire retomber sur les tiers exempt de toute faute la responsabilité d'une nomination irrégulière, et que les actes faits par le curateur apparent doivent être validés comme ceux de l'héritier apparent et au même titre.²³ There are differences of detail however; for instance, an administrator is in privity with his intestate so far as concerns the personalty,²⁴ but an executor is in privity with the testator only so far as under the will he succeeds to the deceased.²⁵ But a judgment against a personal representative of the deceased will not be *res judicata* in a suit against the heir to change the deceased's land in their possession.²⁶ In *Gornett v. Macon*,²⁷ Chief Justice Marshall said, -- "The cases cited undoubtedly show that the executor completely represents the testator as the legal owner of his personal property for the payment of his debts in the first instance, and is consequently the proper person to contest the claims of his creditors. Yet there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit. . . . In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir who does not claim under the executor should be estopped by a judgment against him. . . . In this case the creditor is bound to proceed against the executor, and to exhaust the personal estate before the lands become liable to his claim. The heir as devisee may, indeed, in a Court of Chancery be united with the executor in the same action; but the decree against him would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor is in substance the foundation of the proceeding against the heir as devisee, the argument for considering it as *prima facie* evidence may be irresistible; but I cannot consider it as an estoppel. The judgment not being against the person representing the land ought, I think, on the general principle which applies to give records in evidence, to be re-examinable

²³ *Darkey*, 54 Cal. 1. St.
²⁴ *Stone v. Wood*, 16 Ill. 197.

Dorr v. Storkdale, 19 Iowa 269.
Starke v. Wilson, 65 Ala. 579.
Chant v. Reynolds, 40 Cal. 213.
 6 Cal. 3.

when brought to bear upon the proprietor of the land." On this principle, "an administration account, settled in a cause in which the heirs are not parties, is not competent evidence as against them."²⁸ The converse proposition is also true, that a judgment rendered in a cause to which the heirs only are parties is not binding upon the administrator.²⁹ So also a judgment in a suit between the heirs and the administrator is not binding upon the legatees.³⁰ A legatee of personalty is until the delivery of the legacy in privity with the executor, and therefore concluded by a judgment against him.³¹ A defendant who claimed under a *donatio mortis causa*, has been held to be within the estoppel of a judgment obtained by a creditor of the donor against his administrator, and estopped from showing fraud and collusion, or that there was no such debt as that sued upon.³² It has been held in some cases that an administrator *de bonis non* is in privity with his predecessor, the executor or administrator;³³ and Mr. Herman also citing some cases,³⁴ says, that an administrator *de bonis non* is bound and concluded by the rightful administration of his predecessor—by all acts done within the line of his duty and authority, which are not tainted with fraud—not only by all completed acts of administration, but by all matters of evidence that would affect creditors, legatees and distributees. The weight both of principle and authority is, however, the other way. "The administrator *de bonis non* does not derive his title in any way from his predecessor in the administration, and does not succeed to the same property, but to the unadministered remainder. Therefore, there cannot in principle be any privity between them, and a decision against an administrator-in-chief is neither conclusive nor admissible against an administrator *de bonis non*."³⁵ Nor is a judgment against the latter evidence of the debt as against the representative of the administrator-in-chief.³⁶ The executor of an executor is bound, no doubt, by a judgment against his predecessor; but the reason of the distinction, as explained by Dr. Bigelow, is that an executor deriving his power from the special confidence reposed in him by the testator, is allowed to transmit the authority to another, whereas an administrator acts merely as an officer of the Court appointing him, and cannot transmit his authority,

c. Wright, 17 Gratt. 534.

²⁸ Dorr v. Stockdale, 19 Iowa, 269.

²⁹ Valmain v. Cloutier, 22 Am. Dec. 179.

³⁰ Redmond v. Coffin, 3 Dev. Eq. 435.

³¹ Hooper v. Hooper, 9 B. F. R. 437.

³² Mitchell v. Poase, 7

³³ Boykin v. Cook, 61 Ala. 472.

Stacy v. Phrasher, 6 How. 44.

³⁴ Castellaw v. Gilmartin, 54 Ga.

³⁵ Martin v. Ilberbo, 70 Ala. 326.

³⁶ Thomas v. Storns, 33 Ala. 137.

and has no connection with his successor, further than that they both represent the same deceased. It is generally agreed that there is no privity between the administrator³⁷ or executor at the decedent's domicile, and an ancillary administrator deriving his powers from the Probate Court of another State. "The respective administrators," said the United States Supreme Court in *McLean v. Meek*,³⁸ "represented the deceased by an authority co-extensive only with the State where the letters of administration were granted, and had jurisdiction of the assets there. No connection existed, or could exist, between them, and therefore a recovery against the one in Tennessee was not evidence against the other in Mississippi." In *Pond v. Makepeace*,³⁹ an administrator of O. under the laws of Massachusetts brought a suit in that State against the defendants on a note, and the plea was that an administrator appointed under the laws of Rhode Island had in Massachusetts sued on the same note, obtained *ex parte* judgment, and had execution satisfied; and the Massachusetts Supreme Court said that the proceedings in the former suit by the Rhode administrator were wholly without authority, and might have been defeated by a proper defence, and the defendants having neglected to contest the right of the plaintiff in that suit, could not plead it in bar of the second suit, notwithstanding the satisfaction. "The same Court in *Law v. Bartlett*,"⁴⁰ said—"It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in Massachusetts and within the jurisdiction of its Courts, and the administrator is in privity with him in respect to the estate in Vermont, which he can administer upon. But as the privity relates to different property and different matters, and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator." Executors of the same testator in different States are, as regards creditors of the estate, in privity with each other, and a judgment against one such creditor though not conclusive, will be admissible against other such executors;⁴¹ and in *Garland v. Garland*,⁴² the Court even said—"Between executors of the same decedent in different jurisdictions there is a privity derived from or through the will of the testator, and a judgment or decree against either is evidence against the other, and

E. v. Edwards, 90 Am. Dec. 174.
Merrill v. N. F. Ins. Co., 4 Am. Rep.
Rosenthal v. Henick, 44 Ill. 202.
 18 How. 18.

³⁷ 2 Met. 114.
³⁸ 6 Allen. 250.
³⁹ *Hill v. Tucker*, 13 How. 459.
⁴² 54 Va. 189.

may be enforced against each, and is sufficient to ground a suit or action against either executor. An administrator with the will annexed is, in legal contemplation, executor of the will, and a decree against a domiciliary executor binds every executor of the same will in every jurisdiction."

92. A lessee claims under the lessor and his successors in interest, and therefore a judgment in a suit to which the lessor is a party is *res judicata* against the lessee.¹⁵ The lessor, however, cannot be said to claim under the lessee, and therefore cannot as such, be estopped by a decision against the lessee.¹¹ It has sometimes been held that if the issue in a suit is such as involves the lessor's title, and he assumes the defence or the prosecution of the suit, the judgment operates upon his title, as though he were a party to it.¹⁵ Generally, even this has been denied however. Thus in *Samuel v. Dinkins*,¹⁶ it was said "a tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against the landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still if the landlord was no party on the record, it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defence which as a party he would have enjoyed. If it could by extrinsic evidence be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining, and fairly presenting his title, were exercised by him, still he would not be concluded." Mr. Freeman also observes that—"it is fairly inferable from the decisions upon the subject that it is only when the landlord is formally made a party defendant that he becomes a party, as between himself and the plaintiff, so as to be estopped by a judgment in favor of the latter."¹⁷ Even in British India, it has been held that a lessor cannot be considered as claiming under his own lessee, and the dismissal of an ejectment suit by a tenant of B. against the defendant does not bar a suit for ejectment after B.'s death against the same person in respect of the same land by a successor in title of B.¹⁹

¹⁵ *Hessel v. Johnson*, 124 Pa. St. 233.

¹⁶ *Wenman v. Mackenzie*, 5 Bl. and R. 447.

¹⁷ *Tyrell v. Baldwin*, 6 Pac. Rep. 807.

¹⁸ 75 Am. Dec. 720.

¹⁹ *Orthwein v. Thomas*, 11 Am. St. Rep. 150.

Kent v. Lasley, 48 Wis. 257.

Hyer v. Ripley, 25 Wend. 432.

¹⁸ 17 Jur. 342.

¹⁹ *Rambhadr v. Bunsu Karmakar*, XI C. L. R. 122.

In *Brojo Behari Mitter v. Kedar Nath*,⁵⁰ a decision against a lessee was held not to be *res judicata* against the lessor, even though the latter had also been made a co-defendant in the suit. In *Wahid Ali v. Nauth Tooraho*,⁵¹ a decision as to the genuineness of a *patta* against the *ticcadar* of certain persons was held not to be *res judicata* in a subsequent suit by those persons against the same defendant, on the ground that the *ticcadar* did not represent them.

93. A judgment-creditor attaching and selling the property of his debtor does not represent that debtor as regards that property, even though he has often to rely on and support the debtor's title. Sir Charles Sargent, C.J., in delivering the judgment of a Division Bench of the Bombay High Court in *Shirapa v. Dod Nagaya*,⁵² said:—"Doubtless, the judgment-creditor litigates, both in the investigation under Sec. 278 and in the suit contemplated by Sec. 283, under the judgment-debtor's title; but we think there is great difficulty in holding that he represents the latter in those proceedings on the proper construction of the above sections. The circumstance that the judgment-creditor in most cases is ignorant of the judgment-debtor's affairs, and unfit to represent him in a question of disputed right between him and the claimant, forbids the supposition, in the absence of clear words, that this was the intention of the Legislature. The contrary intention is rather to be inferred from the provisions contained in the sections of both the Codes under consideration for the investigation proceeding as if the claimant was a party to the suit, the object of which would seem to be that the matter should be investigated in the presence both of the judgment-debtor and claimant if necessary. We think, therefore, that the Lower Courts were right in holding that the decree in Suit 886 of 1879, did not operate as *res judicata*, there being no evidence to show that the judgment-creditor, in point of fact, represented the plaintiff so as to constitute the judgment-debtor a party to the suit." In *Gnanambal v. Parvathi*,⁵³ a judgment-creditor, in execution of his decree, attached a certain house as his judgment-debtor's, and the attachment was objected to by a person who had successfully made a similar objection against the attachment of the same house by another judgment-creditor; but it was held that the

⁵⁰ I. L. R. XII Cal. 749.
⁵¹ XXIV W. R. 125.

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⁵² I. L. R. X.
⁵³ I. L. R. XV Mad. 477.

dismissal of even a suit brought by a prior judgment-creditor against the same objector, whatever effect it might receive against the judgment-debtor, could not be *res judicata* in regard to the judgment-debtor's title to the house against another judgment-creditor.

94. The rule as to whether a judgment against a garnishee in favor of the plaintiff's attaching-creditor bars a suit by the plaintiff is not settled. It is generally agreed upon that such a judgment when satisfied by execution is conclusive as to the amount paid,⁵⁴ if the payment is real and made in execution,⁵⁵

and on that account not voluntary. A judgment when satisfied by the garnishee in due course of law is, as Mr. Drake observes, conclusive against parties and privies, of all matters of right and title decided by the Court, and constitutes a complete defence to any subsequent action by the defendant against the garnishee for the amount which the latter was compelled to pay. It has been held in several cases that a judgment against the garnishee merges the original debt, and will bar an action by the judgment-debtor in the attachment against the garnishee for the same debt.⁵⁶ The weight of authority appears to be rather in favor of the view that such a judgment is merely a lien on the fund in the garnishee's hands, and will not protect the garnishee except on payment,⁵⁷ and that appears also to be the rule of the English Courts now. Dr. Bigelow says,—“better opinion, would seem to be that the garnishee is discharged, as against his creditor, as soon as the law places him under a compulsory obligation to pay the plaintiff in attachment.”⁵⁸ An *ex-parte* judgment has generally been given a similar effect,⁵⁹ provided there was no defence on the merits; but the contrary also has been held in several cases.⁶⁰

As a general rule, the garnishee will not be able to rely on the judgment in his favor, unless he has made a complete defence in good faith. Thus if a garnishee is duly notified that the claim has been assigned to a third person before service

⁵⁴ Brown v. Dudley, 33 N. H. 511.
 Stearns v. Wmley, 30 Vt. 661.
 Anderson v. Young, 21 Pa. St. 463.
⁵⁵ Drake Attach. 706.
 Magrath v. Hardy, 4 Bing. N. C. 782.
 Wetler v. Rucker, 1 Brod. and B. 491.
⁵⁶ King v. Vance, 45 Ind. 346.
 v. Merrill, 46 Me. 140.
 v. Brooks, 38 Am. Dec. 362.

Hammatt v. Morris, 55 Ga. 644.
 Scamahorn v. Scott, 42 Iowa, 529.
 v. Simon, 49 Md. 318.
 v. Tracey, 73 Pa. St. 417.
 v. January, 59 Mo. 383.
⁶⁰ Hibernia Savings Society v. Superior Court,

was made on him, and he does not disclose that fact in his defence, (and if the notice is received after filing the answer, in his amended defence); even payment by him in execution will not relieve him from the duty of payment to the assignee;⁶¹ though of course the assignee will not be so liable if he himself is not apprised of the assignment till after the judgment against himself.⁶² On a similar principle, in *Whipple v. Robbins*,⁶³ the garnishee was held liable to pay to his original creditor, as on the garnishment process he did not disclose that a suit by that creditor was pending against him, and the said disclosure would have sufficed to abate the process. So also in *Wilkinson v. Hall*,⁶⁴ the drawer of a note was held liable to pay to the creditor, as on the garnishment process, he did not disclose that the note had been transferred before it, and, as observed by Dr. Bigelow, "the garnishee to be protected against his creditor should, in a word, avail himself of all defences which exist at the time in regard to the debt owed by him (the garnishee) to his own creditor."⁶⁵

Nor will a payment made under a void judgment protect the garnishee against a subsequent payment to the garnishee-creditor. Thus, where an attachment was obtained against one supposed to be living in a foreign country, but who was dead when the suit was commenced, it was held that a payment made by a garnishee under execution was no defence against an action by the creditor's administrator, the whole proceedings in the suit being a mere nullity; nor will a judgment against a garnishee protect him against a subsequent recovery in favor of one who had, previously to the garnishment taken an assignment of the debt from the defendant in the attachment, the garnishee having notice of the assignment.⁶⁶ But a reversal of the judgment on appeal, for irregularity, after payment by the garnishee, will not invalidate the payment.⁶⁷ So also, if the garnishee contest the jurisdiction of the Court, and his objection is over-ruled and judgment rendered against him, a payment made by him under that judgment cannot be collaterally impeached elsewhere on the ground that the Court had no jurisdiction, as its decision on that point is conclusive in favor of the garnishee.⁶⁸

⁶¹ *e. Hottin*, 20 Vt. 144.
⁶² *King v. Vance*, 40
⁶³ 37 Mass. 107.
⁶⁴ 6 Gray, 50n.
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⁶⁶ *Dobbins v. Hyde*, 37 Mo. 114.
⁶⁷ *Duncan v. Ware*, 5 Stew. and P.
⁶⁸ *Gunn v. Howell*, 73 Am. Dec.
Wyatt v. Hambo, 20 Ala. 510
Thayer v. Tyler, 10 Gray
Pratt v. Cunliff, 9 Allen.

On the same principle, the garnishee is bound to raise any objection that there may be against the validity of the proceedings in which the attachment is ordered, as "if the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee," and he would not be protected by the payment, which in that case would be regarded in law as voluntary.⁶⁹ So also the garnishee should before making payment see that all the precedent conditions to the issue of the execution, have been complied with, and if he does not do that, the payment will be no protection; for it is in the garnishee's power to resist the payment until the conditions be fulfilled, failing which his payment is regarded as voluntary.⁷⁰

Under no view, however, the judgment against the garnishee is conclusive as to the total amount due by the garnishee to the attachment judgment-debtor, for if it were otherwise, "it would be in the power of a garnishee, by confessing in his answer a smaller indebtedness than actually existed, to practise an irremediable fraud upon his creditor,"⁷¹ nor will there be a bar by the judgment, if the payment is not actual, but only simulated or contrived. Thus, when certain persons were charged as garnishees, and credited the plaintiffs on their books with the amount of the judgment, and debited the defendant with the same amount but did not in fact pay the money, it was held to be no payment.

95. There is no privity between a purchaser at a sale in execution of a decree, and the judgment-debtor whose property is sold, or the attaching-creditor at whose instance, and for whose immediate benefit, the sale took place. In *Anundo Moyee v. Dhondro Chunder*,⁷² Lord Justice James said, - "Their Lordships think that the title of a purchaser under a judgment-decree, cannot be put on the same footing as the title of a mortgagor, or of a person claiming under a voluntary alienation from the mortgagor." In *Imrit Kooer v. Debee Pershad*,⁷³ Sir Richard Couch, C. J., speaking in the judgment of the Court, of the purchasers at the execution-sale said,—"They are not in the position of a person who

⁶⁹ *Pierce v. Carlisle*, 34 Am. Dec. 403.

⁷⁰ *Moyer v. Lobengrue*, 4 Watts, 324.

⁷¹ *Id.*, 1 How. (Miss.) 42.

⁷² 1 How. (Miss.) 570.

⁷³ *Drake, Attach. B.*

⁷⁴ XIV M. I. A. 111.

⁷⁵ XVIII W. R.

takes a conveyance direct from the party. They are, therefore, not bound by what the judgment-debtor may have stated on some previous occasion." In *Dinendronath v. Ramkumar*,⁷⁴ Sir Barnes Peacock in delivering the judgment of their Lordships of the Privy Council said,—“There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution.” Citing the above decisions, the Calcutta High Court held in *Parbhu Lal v. Mylne*,⁷⁵ that a purchaser at an execution-sale was not the representative of a judgment-debtor for the purpose of the rule of estoppel. And as such a purchaser does not represent the attaching-creditors, he cannot invoke their equities, and claims under them for his benefit.⁷⁶ On a similar principle, a judgment against a bailiff for wrongful attachment is of no effect against a purchaser at the bailiff's sale.⁷⁷

96. There has been a conflict as to whether a judgment against a corporation binds the stock-holders, the conflict being particularly marked in the State of New York. Thus in *Slee v. Bloom*,⁷⁸ the Court of Error reversing the judgment of Chancellor Kent, held that the stock-holders would be bound by the judgment, except for fraud or errors, as the trustees must be deemed to have contracted the debt evidenced by the judgment, as the agents of the stock-holders. But in *Moss v. McCullough*,⁷⁹ and other cases, it has been held to be mere *prima facie* evidence; and sometimes even this has been doubted, and the judgment held not to be at all admissible against the stock-holders.⁸⁰ On the other hand, it has long since been settled in Massachusetts that such a judgment is final and conclusive against them.⁸¹ The same view is held by the Courts in some other States,⁸²

⁷⁴ 1 L. R. VIII 1 A. 67.

⁷⁵ 1 L. R. XIV Cal. 401.

⁷⁶ *Bank v. Roseberry*, 81 Pa. St. 309.

⁷⁷ *Mackay v. K. & B.*, 12 Mich. 614.

⁷⁸ 20 Johns. 949.

⁷⁹ 7 Barb. 279.

⁸⁰ *McMahon v. Macy*, 71 N. Y. 155.

⁸¹ *Hewes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

Thayer v. New England Lithographic Co., 109 Mass. 523.

⁸² *Milliken v. Whitehouse*, 49 Me. 320.

Wilson v. Pittsburgh Coal Co., 44 Pa. St. 424.
Howard v. Glenn, 21 Am. St. Rep. 150.

by the United States Supreme Court,⁸³ and even by the English Courts.⁸⁴ The cases⁸⁵ in support of this view are collected in the notes to *Thompson v. Reno Savings Bank* in the American State Reports, where the learned Editors observe that "a judgment against the corporation is really a judgment against the shareholders in their corporate capacity, and the shareholders are amply represented in the action."⁸⁶ It was observed in *Gaskill v. Dudley*,⁸⁷ that "every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by a judgment against it." Mr. Morawetz in his work on Private Corporations, supports this view as to the binding effect of a judgment on the ground, "that a corporation is composed of its stock-holders, and that a judgment obtained against the corporation is in reality a judgment obtained against the stock-holders in their corporate capacity." There is no reason why the members of a corporation should be allowed to contest a creditor's claim twice,—once in the suit against the corporation through the corporate agents, and again in a suit brought to charge them individually.⁸⁸ Mr. Herman, citing a number of American decisions, says,—“A corporation represents and binds the stock-holders in all matters within the limits of its corporate power, transacted in good faith by its officers, as among the fundamental powers of a corporation are those of bringing and defending suits, affecting the rights and obligations of the corporation, in which it represents and binds the stock-holders as fully as in the making of contracts. . . . Whatever concludes or affects a corporation binds and concludes all of its stock-holders who compose the corporation, and therefore a judgment against a corporation (unless it was procured by fraud or collusion) is conclusive upon the stock-holders as well as against the corporation and its property.” Mr. Freeman also observes, that,—“the existence and organization (of a corporation) being proved, there seems, at the present time, to be no doubt that a judgment against a corporation is conclusive evidence of debt against its shareholders, to be avoided only on proof of fraud, collusion, or mistake, and generally ‘a stockholder is so far an integral part of the corporation that in the view of the law he is privy to the proceedings touching the body

⁸³ *Hawkins v. Glenn*, 9 Sup. Ct. R. 729.

⁸⁴ *Bank of Australasia v. Nias*, 10 Ad. and El. 717.

⁸⁵ *Cole v. Butler*, 43 Mo. 401.

⁸⁶ *Craig v. Sanford*, 14 Iowa, 235.

⁸⁷ *C. v. Peck*, 26 Ill. 139.

⁸⁸ *Cleveland v. Marino Bank*, 17 Wis. 545.

Merchants' Bank v. Chandler, 19 Wis. 545.

⁸⁹ 2 Am. St. Rep. 855.

⁹⁰ 30 Am. Dec. 750.

⁹¹ Mor. 858.

of which he is a member, and is therefore bound by a judgment against a corporation requiring it to levy and collect unpaid assessments on his stock therein.”⁸⁹ The extent to which a decision against a corporation is binding against the stock-holders was well explained in *Semple v. Glenn*,⁹⁰ by Clopton, J., who said,—“The stock-holders were represented by the corporation, so far as to render binding on them the decrees of the Court in respect to corporate matters, and their property rights and interests in the corporation. The decrees of the Richmond Chancery Court may be regarded as having adjudged the fact and amount of the corporate indebtedness; that the creditors were not barred from asserting their claims as against the corporation; and that calls were necessary to meet their demands, which the Court had authority to order, and did order. For these purposes the stock-holders were not necessary parties; and being represented by the corporation, the decrees, in the respects above stated, are binding on them; but they cannot legally operate to fix a personal liability on the stock-holders who were not made parties.” A judgment in a suit commenced after a Corporation has gone into liquidation, will, of course, not operate as *res judicata* against stock-holders.⁹¹

97. A District or Municipal Corporation represents not only its members, but also the general public and the citizens in regard to their general interests, and a decision in a suit to which it is a party will be conclusive against the citizens also. Mr. Freeman says:—“A judgment against a county or its legal representatives in a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit. A judgment for a sum of money against a county imposes an obligation upon its citizens which they are compelled to discharge. Every tax-payer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for its payment, the officers of the county levy and endeavour to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment, nor re-litigate any of the questions which were or which could have been

⁸⁹ Fr. Jud., 323.
⁹⁰ 24 Am. St. Rep. 694.

⁹¹ *Schrador v. Manufacturers Nat. Bank*, 133 U. S. 97.

litigated in the original action against the county."⁹² This was cited with approval in *Harmon v. Auditor of Public Accounts*.⁹³ by Magruder, J., who further referred to several authorities⁹⁴ in support of that view. In *Ashton v. City of Rochester*,⁹⁵ O'Brien, J., in delivering the judgment of the Court, said:—
 "When a judgment is rendered against a county, city or town in its corporate name, or against a board or officer who represents the municipality, in the absence of fraud or collusion, it will bind the tax-payers."⁹⁶ Mr. Freeman further says:—
 "The great majority of the decisions relating to the privity between a Municipality and its taxpayers and citizens have resulted from attempts to resist the enforcement of bonds issued or taxes levied by it, after judgment had been rendered to which it was a party, in favor of such bonds or taxes; but no reason is perceived why the same principle does not apply to other litigated questions. Thus a Municipality may claim that certain real estate has been dedicated to public uses, and as a representative of its citizens and taxpayers may litigate that question with one who claims that it is private property, and not subject to any public use whatsoever."⁹⁷ In *Xiques v. Bujac*,⁹⁸ a decision in a suit against a Municipality, that certain land had not been dedicated to public use was held to bar a suit by a citizen to have that land declared as so dedicated, on the ground that "the Municipal authorities represent not only the corporators but the public." The Supreme Court of California has recently held, in *People v. Holladay*⁹⁹ that a judgment against a Municipality in a suit by it as the representative of its citizens will bar a suit for a similar claim instituted in the name of the State as the representative of the general public. DeHaven, J., observing that, "the rule that the citizen shall not be twice vexed for the same cause of action, is as binding upon the State as upon other litigants; and the Legislature, in conferring upon the City power to maintain and defend in the Courts the rights of the State to streets and squares within its limits, must be presumed to have done so with reference to this well known maxim, and to have intended that the State should be bound by the result of such litigation." This decision has been followed in *People v. Smith*,¹⁰⁰ in which an action to abate a nuisance upon land alleged to be a public street was held concluded by a judgment

⁹² Fr. Jud. 324⁹³ 5 Am. St. Rep. 303⁹⁴ Clark v. Wolf, 20 Iowa, 107.

Tredway v. Sioux C. P. Ry. Co., 30 Iowa, 107.

Wilson v. Rainey, 74 Mo. 220.

18 c. 111

⁹⁵ 28 Am. St. Rep. 619⁹⁶ Lyman v. Paris, 53 Iowa, 498.⁹⁷ Fr. Jud. 325.⁹⁸ 7 La. Ann. 515.⁹⁹ 27 Am. St. Rep. 190.

in a former suit in which the defendant had claimed it as his property against the City and County of San Francisco. Virtually the same was decided in *State v. Chester*,¹ in which the dismissal of a bill by tax-payers to enjoin County Commissioners from issuing bonds, was held to bar an action in the name of the State, at the relation of other tax-payers, against the Commissioners and holders of the bonds to have the bonds adjudged illegal and void. That decision was cited with approval in *Gallagher v. City of Moundsville*,² in which the defendants in the first suit were the Mayor, the Clerk of the Council, and two Commissioners appointed by the ordinance to sell the bonds, and city officials representing and acting for it, and it alone, without private interest; while the defendants in the second suit were the City of M. and Robert Lowe, its Marshal, without private interest, and it was held that they were the same for the rule of *res judicata*, and Brannon, J., said:—"I do not say that in any case,—as for instance, a judgment against a town in a case to which only the Mayor or other officers were parties, and the town not,—the town having capacity to sue and be sued as a corporate being, the town would be bound; but in this particular matter the Mayor and Clerk were made agents to sign, countersign, and deliver the bonds, and the Commissioners' agents to receive and sell them, and though the City was not a formal defendant, yet, in this instance, these agents represented it fully." In *Millikan v. Lafayette*,³ a decision in a suit to which an officer of a Municipal Corporation was a party and the Corporation was not joined with him, was held to be *res judicata* in regard to the Corporation, if it was the real party in interest and as such conducted or defended the suit. This is of quite a general application. Lacombe after observing that moral persons cannot themselves act in judicial proceedings, says:—*Elles sont donc représentées par leurs administrateurs désignés à cet effet dans les lois et règlements qui contiennent leur organisation. . . . Une communauté agissant en justice par ses administrateurs représente tous ses membres en ce qui concerne les droits qu'ils tiennent de leur qualité de membres de la communauté. Par exemple si un jugement rendu contre un maire, en cette qualité dépossède la commune d'un pâturage communal, chacun de ses habitants est privé d'ormais de ses droits sur ce terrain, sans qu'il soit admis à former tierce-opposition à ce jugement.*

¹ 13 B. C. 200.

² 26 Am. St. Rep. 942.

³ 116 Ind. 329.

*Cette théorie ne résulte pas seulement de la législation positive, mais de la nature même de la propriété commune.*⁴

98. A considerable extension has been made in the scope of the words "under whom they claim" by Explanation V, which was introduced for the first time in the Code of 1877. It was also in that Code, that the provision contained in Sec. 30 was enacted for the first time, with reference to which it has often been held that Explanation V must be construed, at least in cases in which the former suit was subsequent to the Code of 1877. The principle of the Explanation had long been recognized and acted upon everywhere in a certain class of cases, often as an exception to the ordinary rule of *res judicata*. It is a general rule in the United States of America that under certain circumstances, persons who are not parties of record may be bound by the judgment, on the ground of their having been represented by one or more other persons having similar and homogeneous interests. It has been directly held there that if a person brings a suit for himself and others not named, alleging that there are a large number of persons interested under a deed with himself as purchasers, and that they are so numerous that it is impracticable to bring them all before the Court, the decree in the suit may be used for the benefit of any of the unnamed parties.⁵ In *Dewey v. St. Albans*,⁶ the Court said:—"Although the general rule in equity is, that all persons having an interest in the subject-matter in litigation should be before the Court, to the end that complete justice may be done and future litigation prevented, yet there is of necessity an exception to this rule when a failure of justice would ensue from its enforcement. . . . Cases in which the parties in interest are so numerous as to make it impracticable or greatly inconvenient and expensive to bring them all before the Court form an exception to the rule. And this exception applies to defendants as well as to plaintiffs. Take the case of a voluntary association of many persons. It is sufficient in a suit against them that such a number be made defendants as will fairly represent the interests of all standing in like character and responsibility". In some of the American States even a judgment against the head of a family has been held to be conclusive on the other members of the family, claiming the same lands as a homestead.⁷ It has been

⁴ *La. Chose Jugée*, 158.

⁵ *Hurlbutt v. Hutcheson*, 27 Cal. 50.
Carpenter v. Canal Co., 35 Ohio, 307.

⁶ 9 Allen, 61, sup. 66.

⁷ *Harfield v. Jefferson*, 64 Ga. 610.
Mason v. Stewardson, 2 Hare, 530.

often held by the English Courts also that when the beneficiaries are so numerous that it will be very inconvenient to bring them all before the Court, some of them may sue or be sued on behalf of all, provided there is one general right in all the parties," and that where the parties are numerous, a judgment against a few selected representatives may bind the rest.⁸ The principle was recognized by their Lordships of the Privy Council in *Jogendro Deb v. Funindro Deb*,⁹ in which Sir James Colville in delivering the judgment of their Lordships of the Privy Council said that, "that case could not in any degree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted or defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." In *Bissessar Lall v. Luchmessur Singh*,¹⁰ there was no question of *res judicata*, but their Lordships, after observing that the presumption from the family having been joint was that the purchase of Muddunpore by R. would be assumed to be a purchase, not on his own account, but for the joint family, and that it would be joint family property, said, "Acting on the principle which follows from their finding that this family was joint, it must be assumed that M. is sued as a representative of the family, and that N. in taking the lease

⁸ In *Adair v. The New River Co.*,¹¹ Lord Eldon said:—"The rule is urged that whenever a rent-charge is granted, all persons who have to litigate any question with regard to the title to that rent-charge, or with each other, as being liable to pay the whole, or to contribute among themselves, must be brought before the Court, and there is no doubt, generally this is the rule. The consideration is very different, if it is necessary to decide this point, whether it is possible to hold, that the rule shall be applied to an extent destroying the very purpose for which it was established, *viz.*, that it shall prevail, where it is actually impracticable to bring all parties, or where it is attended with inconvenience almost amounting to that. It must depend upon the circumstances of each case, but upon all the authorities for the purpose of getting a decree it is not necessary to bring all parties interested There are authorities, that where it is impracticable, the rule shall not be pressed." In *Cockburn v. Thompson*,¹² Lord Eldon referred to a considerable number of exceptions from the general rule as to the presence before the Court of all the persons materially interested in the subject of the suit, and said:—"It must not be adhered to in cases, to which consistently with practical convenience it is incapable of application The principle being founded in convenience, a departure from it has been said to be justifiable when necessary." In *Newton v. Earl of Egmont*,¹³ Shadwell, V. C. said,—"I accede to that rule in *Adair v. The New River Co.*; that rule, however, applied only to cases where there is one general right in all the parties, that is, where the character of all parties, so far as the right is concerned, is homogenous; as in suits to establish a right of way, or a right of suit to a Mill."

⁸ *Commissioners of Sewers v. Gellatly*, 3 Ch. D. 610.
⁹ XIV M. L. A. 367.
¹⁰ L. R. VII. A. 237.

¹¹ 11 Ves.
¹² 16 Ves.
¹³ 5 Sim.

of the *mauzah* (R) in respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family. . . . Looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family Although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property." In *Narayan Gop v. Pandurang*,¹⁴ Sir Charles Westropp, C. J., and West, J., held that even the adult members of a joint Hindu family would be bound by a decision in a suit in which only the head of the family was impleaded, but which he defended with their assistance.

99. The Explanation being based on a principle of general application is applicable even to the cases in which the former suit was decided prior to the enactment of the Civil Procedure of 1877. In *Hazir Gazi v. Sonamonee Dasse*,¹⁵ Jackson, J., in delivering the judgment of a Division Bench of Calcutta High Court said :— "We are not at all prepared to say that Explanation V would apply to a judgment under the Code now repealed." There have been several cases,¹⁶ however, in which the judgment in the former suit was prior to the Code of 1877, and no such objection was ever taken; and even when the former decision was held not to be *res judicata* in such cases,¹⁷ it was so on some other ground.

100. It has been held sometimes, that the Explanation is applicable only to the cases in which the private right claimed by the parties in the former suit was expressly claimed and purported to be claimed in common for themselves and others. The Allahabad High Court took the same view of the scope of the Explanation in *Ram Narain v. Bisheshar Prasad*.¹⁸ In that case, the

¹⁴ I. L. R. V Bom. 655.

¹⁵ I. L. R., VI Cal. 31.

¹⁶ e. g., *Fide* I. L. R., II Mad. 328.

R., VII Bom. 467.

XV P. R. 267.

¹⁷ e. g., *Fide* I. L. R. VI

¹⁸ I. L. R. X All. 411.

former suit was against a Hindu father and his one son for opening a door in a wall, and was decided against them notwithstanding their plea of proprietary right. The decision was held not to be *res judicata* in a subsequent suit against another son, who also was a member of the undivided family, because "the defendants in the former action," said Sir John Edge, C. J., (with whom Mahmood, J., concurred) "did not claim any right in common for themselves or others within the meaning of Explanation V. They said nothing about other persons being equally interested in the wall, nor does it appear that they were sued or defended the action as representatives of the family." The Calcutta High Court took the same view in *Hazir Gazi v. Sonamonee Dasse*,¹⁹ in which the plaintiffs sued N. and H. for certain land alleging that they had taken a lease of it from the defendant's predecessors in title, and they were dispossessed from it while the plaintiff's former suit for some of that land of which N. had dispossessed him was pending against N. alone in the High Court. The Lower Appellate Court held that, H., according to his own admission, having acquired the superior title to the lands in dispute by purchase with joint funds in that brother's (N.'s) name was estopped by Explanation V. from contesting the validity of the *patta* set up by the plaintiffs, which had already been proved in the former suit. The High Court set aside that decision observing: "We are not prepared to say that the Explanation has this meaning, that a judgment obtained against a co-sharer in the property is binding against another co-sharer in the property, and clearly it would not be so where the first suit did not purport to have been litigated *bonâ fide* in respect of a right claimed in common by two persons." The decision of the Bombay High Court in *Gan Savant v. Narayan Dhond*,²⁰ is not against this view, as it turned primarily on the laxity of procedure prevailing in 1856 when the decision pleaded as *res judicata* was passed.²¹

¹⁹ Mr. Justice West said in this case²¹ "when a right is claimed in common for the plaintiff and others, all persons interested may be deemed to be claimants, and thus bound by the result of the suit; but here there was no allegation of a representative character. V. was the eldest brother and manager for the family, of which the present plaintiff was an infant member, but he sued simply in his own name along with a representative of another branch. On the other hand, the present strictness and elaboration of procedure did not prevail in 1856. It was a generally received doctrine that the acts of a manager bound a Hindu family so long as they were honestly intended for its benefit, or were such as might reasonably be deemed to have that character. The Hindu family was, in fact, considered as a corporation whose interests were necessarily centered in the manager, while the manager, as the chief member of the family, was understood to represent the"

¹⁹ I. L. R. VI Cal. 31.

²⁰ I. L. R. VII Bom. 407.

²¹ I. L. R. VII Bom.

101. The Explanation will apply, however, even when Sec. 30 of the Civil Procedure Code has not been conformed to, and the permission to sue or defend on behalf of all the persons interested has not been obtained. This has not been contended against in regard to cases in which the decision in the former suit was passed prior to the enactment of Sec. 30 in 1877. Thus in *Chet Ram v. Bahal Singh*,²³ Barkley, J., expressly pointed out that,—"it is impossible to maintain that, because notice was not given in the previous proceedings under Sec. 30, which was not then law, to all the persons interested, the plaintiffs are not bound by the previous proceedings, of which it is admitted they were aware at the time." That the question of the necessity of the notice required by Sec. 30 can arise in regard to the cases subsequent to the Code of 1877 appears to have been the opinion of Sir Charles Turner, C. J., and Kernan, J., in *Gopalan v. Valia Tamburatti*.²⁴ The expression of opinion of the Madras High Court in that case was not positive and a mere *obiter dictum*, and though it has since been held a number of times that in such cases a notice is necessary, yet a conflict of opinion appears to exist still about the matter. Thus in *Varanakot Narayanan v. Varanakot Narayanan*,²⁵ Forbes and Kernan, JJ., held, that a decision in a suit against a *karnawan* as such in respect of certain property of the *tarwad* in his possession would be binding on the junior members of the family, as they would be deemed to be claiming under him, and said, "Explanation V is not limited in its language to a suit under Sec. 30. . . . In such suits, the party suing or defending must have permission of the Court to sue or defend, and must in the plaint or defence purport to sue or defend expressly on behalf of himself and the others, and notice is required to be given to those interested who are not parties to the suit.

interests whenever these were subject to be affected by transactions in which he engaged, even in his own sole name Where the other members are infants at the time of the suit, that, no doubt, is a reason for scrutinizing the matter with more than usual care in order to protect them against fraud, but here fraud is not suggested: the suit for redemption was, no doubt, brought by V. in perfectly good faith, his own interests being concerned equally with that of his infant brother. His capacity to represent the family was not impaired by any collusive artifice to its prejudice, and the practice having been such as it was in 1856, the mere omission to specify the present plaintiff as a party did not prevent his being bound by the suit in which he was effectively represented by V. At ent V. would have to set forth the minor brother's name."²⁶ but the law of 1856 was exacting in parti

c. Mahadev, 1892 Bom. P.

238.
XV P. R., 202.

²⁴ I. L. R. VI

²⁵ I. L. R. II Mad. 320.

Such suits may embrace claims or rights of a public nature, whereas Explanation V is confined to private rights. Again, Sec. 30 contemplates the case of parties too numerous to be conveniently made parties to the suit. . . . In such cases each of the parties interested, although claiming the same interests, for example, as creditor of a deceased person or of a company, may have a separate interest, *viz.*, in the debt due to him in which the other parties are not interested."

A contrary opinion was expressed in *Vasudevan v. Narayanan*,²⁶ by Innes, J., who even observed that—"the Explanation does not seem to refer to *bonâ fide* defences but *bonâ fide* claims;" but Kernan, J., while assenting to the proposition that all persons, whose interests are sought to be prejudicially affected by a suit, should be parties to it, added that—"there are exceptions to the rule when such interests are considered to be sufficiently represented and protected by parties to the suit," and that it was not necessary in that case to determine whether the case of a *Mulabar tarwad* in a suit to affect the interest of the *tarwad* is within any exception to the rule.

In *Ittiachan v. Velappan*,²⁷ a Full Bench of the Madras High Court upheld the execution-sale in a case in which it was clear that the debt was a *tarwad* debt; and though the *Karnawan* was not described as such, he was impleaded jointly with four *anandravans*, described as such. The Full Bench did so, however, on the authority of the Privy Council decision in *Bissessur Lall v. Luchmessur Singh*,²⁸ but refused to go further; and, as a general rule, observed that: "Where the members of a *tarwad* are not parties to the proceedings and have not been represented in the manner prescribed by the Code, they are not estopped from showing that the debt was not a *tarwad* debt." In *Thanakoti v. Muniappa*,²⁹ a Division Bench of the same High Court held that "Explanation V must be read with the provisions of Sec. 30, and the principles to be found in that section." The Full Bench decision was explained and followed in *Sri Devi v. Kedu Eradi*,³⁰ in which Muttusami Ayyar and Brandt, J.J., said,—"The grounds of decision unanimously adopted by the Court were (1) when the *karnawan* of a *tarwad* was not impleaded as such in a suit, and there was nothing on the face of the proceedings to show that it was

²⁶ 1. L. R. VI Mad. 121.

²⁷ 1. L. R. VIII Mad.

²⁸ L. R. VI I. A. 237.

²⁹ 1. L. R. VIII Mad.

³⁰ 1. L. R. X Mad. 70.

intended to implead him in his representative character, *tarwad* property could not be attached and sold in execution of a decree, even though it was proved that the decree was obtained for a debt binding on the *tarwad*, and (2) that, although the property of a *tarwad* might be attached and sold in execution of a decree when the *karnawan* was sued as representative of the *tarwad*, members of the *tarwad* who were not parties to the proceedings and had not been represented in the manner prescribed by the Code of Civil Procedure were not estopped from showing that the debt for which the decree was passed was not binding on the *tarwad*. The principles on which the grounds of decision were formulated are (1) that a decree can only operate *inter partes*; (2) that if it is desired to extend its operation to those who are not parties to the suit, or who do not claim under them, the procedure prescribed by Sec. 30 should be followed; and (3) that a concession can legally be made in view of the irregular practice in Malabar only to the extent indicated by the ruling of Privy Council in *Bissessur Lall v. Lachmessur Singh*. . . . Hence it was held by the Full Bench that the intention to implead the *karnawan* as representative of the *tarwad* must appear from the proceedings in the first suit, and that the debt recognised by the decree must be binding on the entire *tarwad*. Applying these principles to the case before us, we do not see our way to saying that the respondents were bound by the decree in the suit of 1879, on the ground that their *karnawan* then in good faith opposed the appellant's claim. There can be no doubt that the association of *karnawan* and the senior *anandravan* may be taken to disclose an intention on the part of the appellant to implead the respondents' *tarwad*; but upon the facts found, we must hold that the respondents have shown that the former decree was not substantially correct. The Full Bench decision precludes our holding that the decision against a *karnawan* is binding on the members of the *tarwad* unless they prove *mala fides* in him, in a suit to which they were not actually or constructively parties; if they were so, it would be immaterial whether the *karnawan* acted in good faith or otherwise; if they were not parties actually or constructively, it is open to them to show that the former decree is substantially incorrect, and therefore is not binding on them.' The decision in *Sri Deri v. Keku Eradi*,

was followed in *Shankaran v. Kesavan*.⁵¹ If this view of the Madras High Court were right, and the Explanation V applied only to the cases in which the proceedings were in accordance with Sec. 30, it would not receive any effect, and need not have even been enacted.

In *Chandu v. Kunhamed*,⁵² Sir Arthur Collins, C. J., and Handley, J., observed that—"the contest in that (former) suit as to this particular paramba was between the plaintiffs in that suit asserting that it was property in which they and present defendant No. 1 and their other co-sharers were entitled to share, and present defendant No. 2 denying the same and claiming it as his own property, and therefore present defendant No. 1 and the other co-sharers may be said to claim under the plaintiffs in that suit by Explanation V." The former suit in this case was subsequent to the Code of 1877, but no reference was made in the decision to Sec. 30 or to any of the previous decisions of the High Court. The case is in some respects similar to that of *Madhavan v. Keshavan*,⁵³ in which also the former suit was subsequent to the Code of 1877, and all the *illams* except that of the plaintiff were represented, and the plaintiff's adoption was not recognised at the time by the other *urulars*, but no objection was made in the former suit on the ground of the plaintiff's *illam* not being represented, and Kernan and Parker, J.J., held, that they had 'no doubt that plaintiff's *illam* was sufficiently represented by the *urulars* of the other *illams*, who had a common interest with plaintiff's *illam*.'

102. There appears to be a conflict of opinion with regard to the exact signification of the expression "claimed in common." The Calcutta High Court is in favour of a restricted construction, and in *Kalishunkur Doss v. Gopal Chunder Dutt*,⁵⁴ Sir Richard Garth, C. J., in delivering the judgment of the High Court said,—"It has been decided by the previous judgments in this case, that the right claimed by A. in the former suit, and the right claimed by the plaintiff in the

⁵¹ I. L. R. XV Mad. 6.
⁵² I. L. R. XIV Mad. 324.

⁵³ I. L. R. XI Mad. 191.
⁵⁴ I. L. R. VI C

present suit, is a private right, 'which he claims in common for himself and others' within the meaning of Explanation V. We cannot agree in this view. The right claimed by the plaintiff is not one which he and other inhabitants of the neighbourhood claim under one common title. It is a prescriptive right which he claims individually in respect of his own house and premises, and depends upon how long he or the occupier of the house have used the right. It would not avail the plaintiff, if all the other owners of the houses in the same locality could prove, that they had used the drain for the prescribed period, if he himself or the occupiers of his premises had not used it for that period. The claim, therefore, of each owner is essentially a separate claim in respect of his own premises. Explanation V does not, therefore, apply to such a case. It only applies to cases where several different persons claim an easement or other right by one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land, or to take water from the same spring or well." The Punjab Chief Court, on the other hand, takes a broader view, and in *Chet Ram v. Bahal Singh*,⁵ Barkley, J., said, that "the contention that this explanation only applies to suits for right of way, easements, and the like, has no foundation either in the language of the Section or in the principles of the interpretation of Statutes."

103. A decision in a suit to which a servant or an agent is a party is often held to be *res judicata* against a master or principal and *vice versa*. This view has sometimes been based on the ground that there exists a privity between them, it being said that every one who claims or justifies under a command given by another, is in privity with him who made or issued the mandate, and is bound by an estoppel relating directly to the interest or the right on which the mandate is founded. Thus Mr. Herman says "A master or principal is in privity with his servant or agent when the latter defends an action in the right of the former, and a judgment is an estoppel to a renewal of

the controversy by the principal or master in the suit, on the ground that he is considered the real party, and especially when the principal expressly or impliedly authorized or ratified the acts of the agent, virtually rendering him a party to the proceedings instituted by or against the other. The principal and servant are substantially one in interest."³⁶ The existence of privity between them has, however, often been denied. Dr. Bigelow observes "that judgment against the agent upon a cause of action for which the principal is liable, is probably conclusive upon the principal in the absence of fraud or collusion on the part of the agent,"³⁷ but admits that this is not on the ground of privity of estate between them, and says that the decision in *Pritchard v. Hitchcock*,³⁸ "shows that in the relation of guarantor and principal no privity in the sense in which the law of estoppel is applied exists; and the same is true by the weight of authority of the relation of surety and principal, co-sureties *inter se*, principal and agent, and the like cases where parties are answerable over."³⁹ In *Hayes v. Bickelhaupt*,⁴⁰ it was directly held that agents and principal did not as such stand in privity with each other; and Mr. Freeman, observing that, points out that—"if the principal is ever bound by a judgment against his agent, it is in those cases in which he authorized the institution of the suit."⁴¹ Mr. Black also admits⁴² that, "as a general principle, it is undoubtedly true that there is no privity of estate between principal and agent."

In *Emma Silver Mining Co. v. Emma Mining* a judgment in a suit against an agent was held to bar the plaintiff as against the principal, but not on the ground of privity. In the judgment, Choate, D. J., said—"The weight of authority is that where an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judg-

³⁶ Herm.

³⁷ Big. Estop. 145.

³⁸ 6 Man. and G. 151.

Lyman v. Paris, 53 Iowa, 498

³⁹ 24

⁴⁰ Fr

Bl. Jud. 660.

7 Fed. Rep. 401

ment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause, because so to conclude would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy, which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in Court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both." In *Emery v. Fowler*,⁴⁴ the Supreme Court of Maine said: "If the action were brought against the servant, he could be permitted to prove that he acted as the servant of another who commanded the act, and was justified in the commission of it; or who, if the act were unlawful, had made compensation for it either before or after judgment, and his defence would be complete. It is not perceived why he may not, upon the same principles, be permitted to prove that the plaintiff had commenced a suit against his principal for the same cause of action, and proved the acts of his servant as material to the issue tried between them, and that a judgment upon the merits had been rendered against him. In such case the principal and servant would be one in interest, and would be known by the plaintiff to be so. To permit a person to commence an action against the principal, and to prove the acts, alleged to be trespasses, to have been committed by his servant, acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule, that a judgment can only be admitted between the parties to the record, or their privies, expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others."

On a similar principle, it has been held that if a suit against a servant for damages for a wrongful act authorised

⁴⁴ *Emery v. Fowler*, 63 Am. 627.

by his master is dismissed on a ground equally applicable in an action against the master, such for example, as the lawfulness or unlawfulness of the act in question, the dismissal will bar a subsequent suit for that act against the master.⁴⁵ So also where the plaintiff sued for certain cattle, and the defendant justified his taking them under the authority of a person whose property he contended they were, the determination of the issue as to the master's title was held barred by a decision in a former suit against the master in regard to the master's proprietary right.⁴⁶

A decision against an agent, passed when he is acting beyond or without authority from his principal, can of course, not be *res judicata* as against the principal.¹⁷

A decision against a Government officer is not binding in any case against the Government. This was the view taken by the New York Supreme Court in *Peck v. State*,⁴⁸ in which it was held that a decision against the managers of a state asylum even in regard to acts they had to do as officers of the Government was not so binding, and Earl J., in delivering the judgment of the court, said: "The state was not a party to that proceeding, and in that proceeding the asylum managers did not represent the state. It was a proceeding against them to compel them to discharge what was claimed to be a duty resting upon them under the law of their creation and the contracts into which they had entered. While they represented the state in making the contracts with Peck and Co., they did not stand in the place of the state in any suit brought against them, either for misfeasance or nonfeasance in the discharge of the duties which devolved upon them by law. No provision is found in any statute giving them authority to represent the state in any litigation, or giving the consent of the state to be bound by any adjudication to be made against them. A state cannot be sued in its own courts, except by its consent, and this rule is founded upon public policy of great importance, and it would be greatly impaired and could be largely nullified, if the state could be bound by judgments rendered against its agents or officers. Such judgments may bind the officers and compel them to

⁴⁵ 40 41 Am. Dec. 675.
v. Welsh, 1 Stark, 347.
⁴⁶ Calkins, v. Allerton 4 Barb. 171

¹⁷ *Peterman v. Lothrop*, 34 Pa. St. 222.
Castle v. Noyes, 14 N. Y.
⁴⁸ 31 Am. Rt.

discharge their duties, and thus frequently they enable claimants to obtain payment of their claims against the state and other rights to which they are entitled by law. But the adjudication in such actions never estops the state on the principle of *res adjudicata*. And so it has been frequently held.⁴⁹ ”

104. A decision in a suit to which a principal or a surety is a party is in certain cases binding against the surety or the principal debtor respectively. In *Spencer v. Dearth*,⁵⁰ the Supreme Court of Vermont said: “It would seem that the doctrine of the more recent cases is that the relation between joint and several contractors, whether they stand in the relation of principal and surety, or are both principals, creates such privity between them that a judgment for or against one of them, founded on the merits and not on technical grounds, and obtained without fraud or collusion, is evidence for or against the other in a subsequent suit involving the matters adjudicated in the former action. And where the defendant in the second action had notice of the former suit and an opportunity to make defence, or where the defendant in the second action voluntarily appeared and assisted in the former proceedings, or in case of payment made by a co-contractor who is a party of record in the second, but was not in the former action, or a release to him of the whole cause of action, or accord and satisfaction, where either of such matters is presented in the former action by the party therein, and urged for himself and through his agency for and on behalf of another party not on the record, but having a direct interest arising from express contract or by operation of law to prosecute or defend the suit, and same is prosecuted or defended with his express or implied countenance, such judgment is conclusive evidence in the second suit of the matters so adjudicated in the former action.”

There is no unanimity, however, as to the exact cases in which such decision has this binding effect. It may be

⁴⁹ *See* Campbell, 104 U. S. 736,
Ames, 107 U. S. 711,
McCormick, etc. R. R. Co.,

U.
Haus v. Louisiana, 134 U. S. 1
North Carolina v. Temple, 194

v. McCannaughy, 140 U. S. 1,
Pennison, 34 N. Y. 272
v. State, 99 N. Y. 491.

v. State, 105 N. Y. 229,
Gates v. State, 129 N. Y. 221.
 43 Vt. 112

taken as settled that a decision in favour of the principal debtor in a suit against him alone by the creditor is conclusive in favour of the surety also as against the creditor.³⁰⁶ This is so however not on the ground of the doctrine of *res judicata*, but on account of the very nature of a surety's obligation.^N Lacombe, who is a strong advocate of the non-

N. The surety's obligation in such a case is of a character similar to that of a debtor who is liable jointly and severally with another, and it appears to be settled that a finding in a suit brought against one of such debtors in his favour as to the plea of payment, &c., by him will be *res judicata* in a suit against any other debtor liable jointly and severally with him. This was well explained in *Spencer v. Dearth*, in which the Supreme Court of Vermont said: "Each signer of a joint and several promissory note undertakes, for himself, and as surety for the other signers, to pay the note according to its tenor. When one of the signers has paid the note in full, or made payment on it, such payment is as between the makers and payee regarded as payment made by all makers; it constitutes a defence to the claim common to all the promisors. If action be brought against one of them, and the defence of payment is interposed, and it prevails, and judgment is rendered against the plaintiff, on the ground that the note was paid in full before the commencement of the suit, the plaintiff by such adjudication has had his day in court. The question of payment determined against him was not only a full defence for the promisor against whom that suit was instituted, but also a full discharge for the other makers from the debt indicated by the note, and the judgment as conclusive evidence of such payment could not be excluded in a subsequent action against a maker of the note, though not a party of record to the former adjudication, without unjust discrimination as to the respective rights and remedy of the parties in the prosecution and defence of suit or suits upon such a contract. * * * And if he (the creditor) proceed to trial and final judgment, in a suit against one or more of the makers of the note, and not against all upon the defence of payment, or other defence to the merits, that would discharge the claim as to all the promisors, we may assume, until it be shown that he has just cause for a new trial in the same action, that he has had such a trial and adjudication of the matters involved as the law contemplates, co-extensive with the rights accorded to the party against whom he sought to enforce the claim. In such trial and adjudication upon matter of defence to the whole merits of the plaintiff's claim, such as payment of the note in full, and final judgment is against the plaintiff, such judgment is not on grounds personal to the maker of the note the plaintiff had elected to sue, but it is also in effect on the ground that he has no cause of action against the other makers of the note, or either of them * * * Where one of the makers, in a suit against him, upon the defence of part payment, or offset of a claim in his favour, has reduced the amount of the note, another maker of it, in a subsequent suit, can legally claim that the plaintiff should be bound by the former adjudication, as showing the balance due upon the note at that time. Such claim being mutual as between the parties to the first suit would not be so between those in the second, and for this reason the merits of it could not be litigated as an offset between the latter. This is one of the reasons for holding the former judgment upon such matter conclusive. The claim is by the former adjudication merged in the judgment, and thereafter no action will be upon it. Hence, it would not do to say that the plaintiff, in a suit on the note against another maker, could collect of him that part of the note which had been satisfied by offset of the claim against the plaintiff. To allow him to do this would allow him in the first suit, by offset to the note, to pay and satisfy a debt due from himself to one maker of the note, and in the second to collect the whole note of another maker thereof. It can make no difference that the claim in offset was originally a matter personal between the parties to the first suit, because by its adjudication and offset the effect is the same as if the defendant in the first suit, before its commencement, had made a payment from his own private funds to apply on the note, and the same had been allowed in assessing the damages. Upon the same principle, where judgment is rendered against the plaintiff in a suit in his favour against one of the makers of the note, and the ground on which the plaintiff failed to recover is that the note had been paid in full, or satisfied by offset of a claim due from the plaintiff to the defendant, such judgment should be regarded as a legal bar to a recovery against either of the other makers, though not a party to the former adjudication."

application of the doctrine of *mandat* and representation in all such cases, says:—“*L'on sait en effet: (1) que le cautionnement ne peut pas exister sans une dette principale; (2) que la caution ne peut pas être tenue plus rigoureusement que le débiteur cautionné; (3) qu'il n'y a pas de cautionnement si la dette principale n'est pas civilement valable; (4) que la caution peut par suite se prévaloir de toutes les exceptions réelles que pourrait opposer le débiteur principal. Il résulte de ces principes que la caution peut invoquer comme entraînant sa propre libération le jugement rendu au profit du débiteur principal; ce n'est pas qu'elle puisse, comme ayant—cause du débiteur, prétendre qu'elle a été représentée par lui dans l'instance, mais le jugement envisagé comme simple fait, entraînant l'extinction de la dette principale indépendamment du bien jugé et de l'autorité de la décision, est une cause suffisante d'extinction du cautionnement. Nous avons eu plusieurs fois occasion d'appliquer ce principe que le jugement fait foi, même à l'égard des tiers, de la décision qu'il a donnée à la question litigieuse; or la caution n'a qu'à l'invoquer dans ces limites, puisqu'il lui suffit de dire: le, débiteur principal n'étant plus tenu vis-à-vis du créancier, je ne puis l'être moi-même. Ce qui prouve au surplus que cette solution découle de la nature même de ce contrat, c'est que, s'il n'en était pas ainsi, le jugement serait sans utilité pour le débiteur même qu'il aurait libéré, puisque la caution, qui serait forcée de payer le créancier si elle n'était admise à lui opposer l'exception de la chose jugée avec le débiteur principal aurait son recours contre ce dernier.*”⁵¹

In *Brown v. Bradford*,⁵² the Georgia Supreme Court said: “The sheriff could, beyond doubt, protect himself by the judgment, and when he is clear we think his sureties are clear. The responsibility is for his default, and he is in default when he acts against the judgment of the courts, and not when he acts in conformity with them. He was not

cation. To this extent, effect should be given to the judgment in view of the privity existing between the promisors, and in view of the fact of such payment or offset determined by the judgment. In such case, after the question of payment or other matter in full action of the note has been once determined by such judgment against the plaintiff, can be no foundation for a suit against any other maker of the note.” On the general principle, a finding in a suit brought against the maker of a note by its in favour of the defendant will be *res judicata* in a suit against him by an in

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in default in refusing to account again for this money after there was a judgment of the proper court that he had already accounted for it once, and was not bound to account for it any more."

Dr. Bigelow has expressed himself as of opinion that a decision in favour of a surety in a suit against him alone will be binding against the creditor in regard to the principal debtor also. He broadly says, that—"it seems clear that a judgment in favor of the principal or the surety in a suit against either, upon a ground applicable to both, should (so far) be accepted as having conclusively decided against the plaintiff's right of action."⁵⁴ The only authority he cites in favor of this view, is a decision by the Supreme Court of Missouri in *State v. Coste*.⁵⁵ On general principles it is clear that the considerations applicable to a judgment in favor of the principal can have no application when the judgment is in favor of the surety alone, as in the latter case there need be no extinction of the principal debtor's obligation. A view similar to that of Dr. Bigelow has often been taken by French jurists *qui admettent que l'existence du mandat ad litem peut etre subordonnée a l'issue du procès croient que le débiteur est libéré par le jugement qui repousse l'action du créancier contre la caution, si d'ailleurs il n'est pas motivé sur des considérations personnelles à cette dernière*. This view has, however, often been dissented on principle there also. Thus Lacombe has argued strongly against it, and concludes by saying:—*Nous préférons admettre que se jugement est à l'égard du débiteur principal 'res inter alios acta,' et que, non obstant son existence, le créancier peut lui réclamer le paiement de sa créance, et que le débiteur lui-même avant de rembourser la caution, peut également demander à cette dernière de lui rapporter sa libération de l'obligation principale.*⁵⁶

As to the cases when the decision in the first suit is against the principal debtor, there is a general accord that ordinarily it is not binding on the surety. This has been held directly in *Young, ex parte*,⁵⁷ in which Lush, L. J., said "Messrs. Cantor claim to prove for the amount which has been awarded in an arbitration to which Mr. Kitchin was no party, an arbitration between themselves and the prin-

⁵⁴ Big. Estop. 123.
⁵⁵ 35 Am. Dec. 146.

| ⁵⁶ Lac. (Honn Jugac, 196
⁵⁷ Ch. D. 600.

cipal debtors pursuant to the terms of the agreement. Now I agree with Mr. Linklater that, if the guarantee fairly bears this meaning, not only that the firm shall arbitrate if they are required to do so, but, 'I undertake to pay you such sum as the arbitrators shall find that they owe you for damages,' a proof might well be made for that sum. But I do not think any of us ever saw a guarantee in such a form, and, to my mind, this guarantee has not, and was never intended to have, such an effect. There is not a word said in it as to what amount the surety will pay ; it is not usual to say that, and there is not a word about it here. What he says is, 'I undertake and guarantee that all wines supplied to them by you shall be duly paid for.' Now, suppose the dispute between the parties was whether a given amount was due for wine ; supposing the creditors had brought an action against the debtors, and had proved before a jury, and had got a verdict for a given amount as being the debt due to them for wines supplied, and they had then brought an action against the surety upon this guarantee, that verdict would have been no evidence against the surety of the amount due for wines. The creditors must have proved it over again against the surety, because he is not bound by any admission or statements of the principal as to what amount is due. He is only bound to pay the amount which shall be proved against him. In such a case as that, the verdict would have been no evidence at all, except to show what the amount of the verdict was. It would have been no evidence of the surety's liability to pay that amount. Then we go on to the next clause: 'I undertake and guarantee that the agreement shall be otherwise duly performed in all respects.' That is all. He does not say a word about paying anything. That is left to the proper legal conclusion. He would have to pay damages for the breach of the contract by the new firm. How are those damages to be assessed ? Why, in the same way as the debt would have to be assessed if the claim were for wine supplied. You must find explicit words to make a person liable to pay any amount which may be awarded against a third person, whether it be by a jury, or a judge, or an arbitrator. That is not the natural construction of the words of this guarantee nor the usual form ; for, as I have already said, I never saw a guarantee which contained such words. What the guaran-

tor engages for is to be answerable for any debt they may owe for wines, and for any damages which may be sustained by the breach of any other of the provisions of the agreement. Then the amount of the debt in the one case, and the amount of the damages in the other, must, if the surety insists upon it, be proved as against him, just as it would have to be proved if the action were against the principal." Similarly, James, L. J., said: "It is contended that he is liable to pay any sum which an arbitrator shall say is the amount of the damages. The guarantee must be expressed in very clear words indeed before I could assent to a construction which might lead to the grossest injustice. It is perfectly clear that in an action against a surety the amount of the damage cannot be proved by any admissions of the principal. No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay. If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it. But it would be a strong thing to say that he has done so, unless you find that he has said so in so many words. The arbitration is a proceeding to which he is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admission of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained." The United States Supreme Court held in *McLaughlin v. Bank of Potomac*,⁵⁰ that a former judgment against an administrator, unless

fraudulent or collusive, would be conclusive against his sureties.

The contrary also is often held. Mr. Wells says⁵⁹—"The general rule as deducible from the cases is that a judgment is at least *prima facie* evidence against the sureties, but not always conclusive."⁶⁰ As for instance, where one is surety for another's conduct, or where a suit on an administrator's bond is brought, and a judgment is adduced in favor of a creditor against the administrator."⁶¹ However, in the case just cited, the former judgment was held conclusive against the sureties. The action in which the judgment was obtained was against the administrator alone. He refused to pay the judgment, and an action was brought against the sureties on the bond, and it was held that the judgment not being obtained by fraud or collusion, was conclusive upon them in regard to all matters of defence affecting the merits of the controversy between the parties to the judgment, so that the plaintiff being a corporation and the administrator having pleaded the non-existence of the corporation and having failed in the plea, the sureties could not, in the subsequent action against them on the bond, be permitted to deny the existence of the corporation at the time the judgment was rendered. And, also, a judgment against an administrator is conclusive on his sureties as to the amount of the indebtedness, although not against the heirs not made parties." Speaking of such cases, Mr. Herman says, broadly,—“Upon principle a judgment in an action against the principal alone for acts or omissions which are a breach of the conditions of his bond, are in the absence of fraud and collusion, conclusive evidence in an action brought by the same plaintiff, against his sureties on his official bond, the cause of action being the same. It may therefore be said that the authorities holding that judgments against a principal are *prima facie* evidence in an action against the sureties, it is meant that, unless fraud or collusion or a mistake in the facts can be shown, the judgment is conclusive, and this doctrine is applicable in actions upon bonds or recognizances given for the faithful performance of the duties of administrators, assignees, constables, sheriffs, trustees and other parties

⁵⁹ Wells Res. Jud. 84.
⁶⁰ Train v. Gould, 5 Pick. 38.

⁶¹ Heard v. Lodge, 20 Pick. 53.

filling offices, of public or private trust. . . . In consequence of the obligation of the surety being dependent on that of the principal debtor, the surety was also regarded as the same party with the principal in respect to whatever is decided for or against him Whatever has been decided in favor of the principal must be taken to be decided in favour of the sureties, who ought in this respect to be considered the same party, and *vice versa*, when the judgment was against the principal, the creditor can make it available against the surety, and demand that it be carried into execution against him. . . . The measure of his (principal's) responsibility is the measure of theirs (sureties'), and any act of the principal which estops him from setting up a defence personal to himself operates equally against his surety."

Mr. Black, on the other hand, says:—"The general tendency of the English and American Jurisprudence is to hold, in ordinary cases of suretyship, that a judgment against the principal is not conclusive upon the surety, unless the latter was made a defendant in the action."⁶² And in New York, the authorities even go so far as to hold that a surety for a debt will not be bound by a judgment against his principal, even though the suit was conducted, on the part of the principal, exclusively by the surety as his agent.⁶³ But still there are many cases which sustain the doctrine that the judgment against the principal is at least *prima facie* evidence against the surety, though liable to be impeached for fraud, collusion, mistake, or payment.⁶⁴ On the whole, the best rule which can be deduced from the authorities is that the judgment is conclusive upon the surety only in cases where the principal may be considered as the former's agent in the particular transaction, and where, upon a fair consideration of the contract of indemnity, it may be construed as binding the surety to a responsibility for the conduct or result of the suit in which the judgment is rendered.⁶⁵ There is a similar conflict of opinion in regard to the point among French

⁶² Bl. Jud. 608

⁶³ King v. Norman, 4 C. B. 864
Douglass v. Howland, 24 Wend. 35.

⁶⁴ Meas v. McCullough, 5 Hill (N. Y.) 131.

⁶⁵ Drummond v. Preetman, 12 Wheat. 515.

⁶⁶ Stovall v. Banks, 10 Wall. 682
Towle v. Towle 46 N. H.
Way v. Lewis, 115 Mass.

Parkhurst v. Sumner, 56 Am. Dec. 94

Jurists. The broader view of Mr. Herman, to quote from Lacombe,—*est professée par le plus grand nombre d'auteurs et a été depuis long temps consacrée par le cour de cassation.*⁶⁷ This view is attempted to be justified on the ground of a *mandat* by the principal debtor to the surety to represent him in litigation, but Lacombe who is in favour of the narrower view, points out that it is contrary to the spirit even of the French legislation to admit so extended a *mandat*.

The cases in which a decision against a principal is held by the American and the English Courts to be *res judicata* are those in which the guarantee is really for the consequences of the determination of the Court and for the consequences to the principal of that determination. The bar in these cases is evidently quite independent of the doctrine of *res judicata* or any analogous principle, but a result merely of the conditions of the contract of guarantee. It is on this principle that a decision against an executor, administrator⁶⁸ or guardian⁶⁹ is held to be final and conclusive against his sureties in the absence of fraud or collusion. In some cases, such a decision has even been said to be merely *prima facie* evidence against the sureties, but this is correct only so far as certain other defences are also open to them. It is thus generally held that if an administrator does not plead the statute of Limitation, the sureties may do so in the subsequent suit against them. Thus in *Daves v. Shed*⁷⁰ the administrator not having raised that plea, Parker, C. J., observed that “he was obliged to make that defence for the protection of the heirs, devisees, legatees, and purchasers of the estate which he represents,” and said: “We are clearly of opinion under these circumstances (of failure so to plead), the executors of the surety have a right so to plead the same matter in their defence, not being barred by a judgment suffered collusively or negligently by the administrator from a protection which the law intended for their benefit.”

⁶⁷ *White v. Weatherbee*, 126 Mass. 430.
⁶⁸ *c. Jerome*, 58 N. Y. 313.
Martin v. Tally, 73 Ala. 23.
Ferguson v. Glass, 13 La. Ann. 607.
Housh v. People, 66 Ill. 172.
Taylor v. Hunt, 34 Mo. 205.
 12 Mo.
 44 Ohio.

Boyd v. Caldwell, 4 Rich. 117.
McLaughlin v. Bank of Potomac, 7 How. 230.
Drummond v. Preston, 13 Wheat. 520.
⁶⁹ *c. Boyd*, 64 Ala. 399.
c. Menke, 100 Ill. 204.
c. Kalback, 55 Iowa, 110.
c. Mercer, 44 Ohio, 339.
⁷⁰ 8 Am. Dec. 80.

Similarly in *Heard v. Lodge*,⁷¹ the Massachusetts Supreme Court having laid down broadly that the sureties on an administrator's bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrators, added that "the sureties are not to be concluded by a judgment suffered collusively by the administrator, and they have also the right to insist that the action against the administrator shall be commenced within the limitation period." So also, if the administrator fails to file a suggestion of insolvency when he should have done so, the sureties are not precluded from doing so in a suit against them.⁷²

Barring such defences, the decision in such cases is binding against the surety, as "the rendering true accounts and having them settled is a part of the duties for the performance of which the sureties have become bound, and there is therefore more reason to hold them bound by judicial determinations of the liability of their principals than there is any other class of sureties, excepting only those who have expressly made themselves answerable for the payment of judgments, or for other results of litigation."⁷³ Thus in *Irwin v. Backus*,⁷⁴ Saunderson, C.J., distinguishing the case of such sureties from that of the sureties upon ordinary official bonds, said that the "distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration-bond enter, which are, that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands pursuant to the orders and decrees of the probate Court."

In *Tracy v. Goodwin*,⁷⁵ Chapman, J., in delivering the judgment of Massachusetts Supreme Court, held the surety liable for the full amount of a judgment against the constable, and said, "We think it more in conformity with the true intent and spirit of their obligation to hold that it is a guarantee to the plaintiff for such amount as he has legally established to be due to himself from the constable, and

⁷¹ 32 Am. Dec.

⁷² *Hayes v. Seaver*, 7 Mo. 239.

⁷³ *Lipscomb v. Postell*, 77 Am. Dec.
Bennett v. Graham, 71 Ga. 211

Ferguson v. Gilze, 12 La. Ann. 668.

Walmesley v. Mendelssohn, 31 La. Ann. 172.

⁷⁴ 85 Am. Dec. 125.

⁷⁵ 5 Allen.

that, in the absence of fraud or collusion, the judgment against him settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover damages against him, but the amount of the damages.”

As to the case of sureties on official bonds, Mr. Freeman adds—“ We shall still find a diversity of opinion; but the cases holding judgments against a principal not to be conclusive against his sureties are relatively more numerous, though probably still in the minority.” As a fact, the rule applicable to such sureties is the same with that applicable to others, the same distinctions being observed in both cases. Thus in *Fay v. Ames*,⁷⁶ the sureties were held by the New York Supreme Court to be bound by a decision against the Sheriff on the ground that, “the defendants being jointly bound to indemnify the plaintiff, they were in privity of contract with each other, and are to be regarded and treated *quoad* the contract, and the rights and liabilities connected with, and growing out of it, as one person,” the Court expressly observing that in such a case a “notice of the suit to one is notice to all,” and that “if in addition to giving notice to the Deputy, notice had been given to the sureties also, it would have been little more than an idle or useless ceremony, as it is to be presumed that all they would or could have done would have been to refer the matter to their principal, the Deputy, and cast upon him the burden of the defence, as the Sheriff has done.”

On the other hand, it was held in *Thomas v. Hubbell*⁷⁷ that the decision against the Deputy Sheriff was not *res judicata* against the sureties, and in enunciating the general rule, the same Court said—“Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice, and the opportunity being given him to defend it, a judgment against the principal alone is, as a general rule, evidence against the surety, of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment.”

As to the particular case, the Court added: "The terms of the condition of this bond do not bring it within the class of cases in which an indemnitor is concluded by the result of a suit against the person whom he has undertaken to indemnify, upon the ground that such is the fair interpretation of the terms of the contract. This condition is only that he will do his duty as a Deputy Sheriff. In the class of cases alluded to, the contract of indemnity is held to stipulate for the result of a litigation to which the indemnitor is not a party, and to make his liability to defend merely upon the result."

The real distinction between these two cases is that in the former, the recovery of judgments against the obligee was the very thing stipulated against; while in the latter, it was only the general conduct of the deputy in respect to his duties that fell within a fair interpretation of the bond. The distinction was well explained in *Bridgeport Ins. Co. v. Wilson*,⁷⁸ in which the Court said:—"Covenants to indemnify against the consequences of a suit are of two classes: (1) where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide by the result; and, (2) where the covenant is one of general indemnity merely against claims or suits. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party and had no notice; for its recovery is the event against which he covenanted."⁷⁹ In those of the second class, the judgment is *prima facie* evidence only against the indemnitor, and he may be let in to show that the principal had a good defence to the claim."⁸⁰ In this case, the covenant was of the second class, and the decision proceeded on the principle adopted in *Thomas v. Hubbell*. This distinction has been pointed out in several cases. Thus in *Spencer v. Dearth*,⁸¹ *Wilson, J.*, in delivering the judgment of the Vermont Supreme Court, said: "Some of the cases that profess to follow the common-law rule make it depend upon what is the true meaning of the engagement which gives rise to the question. They say if the engagement be merely that a particular thing s

⁷⁸ 94 N. Y. 261.

⁷⁹ *Patton v. Caldwell*, 1 Dall. 419.

⁸⁰ *Smith v. Compton*, 3 B. & Ad. 407.

⁸¹ 43 Vt. 104.

be done or omitted by the principal, a judicial decision in a proceeding against him will avail nothing towards establishing the existence of the default on which it is founded, in a subsequent suit against the surety or guarantor. But the same cases maintain the doctrine that when the engagement is virtually, or in terms, to be answerable, not merely or directly for acts *in pais*, but for their legal consequences, as ascertained in the course of subsequent legal proceedings, then the result of one action will be conclusive in the other." In *State v. Colerick*,⁸² *Taylor v. Barnes*,⁸³ and *Stuart v. Thomas*,⁸⁴ also, the decision against the principal was held to be only *prima facie* evidence against the sureties, as the bonds on which the claim was based in those cases were not conditioned for the payment of judgment. In such cases an indemnitor is bound by a decision in a suit against the covenantee, only if he is apprised of the suit, and a notice is given to him to come in and defend. In *Robinson v. Baskins*,⁸⁵ the decision was held to be not conclusive, as a notice of the suit had not been given. On the other hand, in *Conner v. Reeves*,⁸⁶ the suit was brought upon an indemnifying bond given to a Sheriff to save him harmless against all "suits, actions and judgments that may at any time arise, come, accrue, or happen to be brought against him for, or by reason of, the levying, attaching, and making sale under and by virtue of an execution issued to him as Sheriff:" and Andrews, J., said,—“The covenantor, in an action on a covenant of general indemnity against judgments, is concluded, by the judgment received against the covenantee, from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of judgment is an event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant to depend upon the result of the re-trial of an issue, which, as against the covenantee, had been conclusively determined in the former action.” This decision was followed by the Supreme Court of Nebraska in *Pasewalk v. Bollman*,⁸⁷ in which the leading cases on the point are

collected, and the covenant was of the same character; and Norval, J., said,—“The sureties undertook to save the officer harmless from any judgment that might be recovered against him by reason of the levying of the executions. It was no part of the agreement that the sureties should be notified of the pendency of the action. If the sureties desired notice of the proceedings to obtain the judgment, they should have stipulated for it in the bond of indemnity; not having done so, the failure to receive such notice does not affect their liability. They agreed absolutely to be bound by any judgment rendered against the officer. In the case of most official bonds, the sureties do not promise to pay any judgment rendered against the principal, hence a judgment against the official on such a bond is not conclusive upon the sureties, where the latter had no notice of the suit. There are numerous decisions, however, to the effect that a judgment obtained in a suit on an official bond against the principal is conclusive against the sureties, though not notified of the suit.⁷⁵ It has likewise been frequently held that a judgment against an administrator, in the absence of fraud, is conclusive against his sureties.” The conclusion we have reached is, that in an action against the sureties on a bond given to a Sheriff to indemnify him against judgment to which he shall be a party, the judgment recovered against the officer is conclusive against the sureties, although they had no notice of the pendency of the action in which the judgment was obtained, when it is shown that their principal defended the suit for the officer.”

The only other cases in which a surety is bound by a decision in a suit to which he is not a party are those in which a notice of the suit is given to the surety. Thus in *Gibson v. Love*,⁷⁷ it was held that a judgment against a surety, obtained without fraud or collusion, in an action of which the principal or any co-surety had notice, is conclusive in favor of the surety in an action against the principal or the co-surety for contribution. The Court further said in the case that “if the surety has notice of the suit, and he does not choose to defend it, he thereby waives all the defences he might otherwise have to the introduction of

Masser v. Strickland, 19 Am. Dec. 689.
Evans v. Commonwealth, 34 Am. Dec. 477.
v. Barr, 11 Pa. St. 52.
v. Goodwin, 6 Allen, 413.

⁷⁵ *Heard v. Lodge*, 32 Am. Dec. 107.
State v. Holt, 73 Am. Dec. 2.
Irwin v. Backus, 65 Am. Dec. 185.
Ralston v. Wood, 66 Am. Dec. 614.
 3 Fla.

the instrument to be introduced in evidence; and his right is gone to contest its validity in a collateral way in a suit brought by the co-surety for contribution, for it must be deemed *res judicata*." On the same principle, a judgment against one of the co-sureties in a suit, of which notice is given to his co-sureties, is generally held to be *res judicata* as against them in regard to any issue they could raise in that suit, as they stand virtually in privity with him, and are bound to become parties to that suit, and raise it therein.⁷⁸

105. It is also a well settled rule that where one who has conveyed land to another with warranty of title, is vouched in by the latter, upon due and proper notice to defend a suit of ejectment brought by a third person against the warrantee, or voluntarily appears and assumes the defence, the judgment if given for the stranger, will be conclusive in a subsequent suit by the grantee against his grantor, of the fact that the former has been evicted from his possession by a paramount title.⁷⁹ In the absence of notice the weight of authority is clearly in favor of the view, that the judgment will be admissible to prove the eviction, but not the fact of the eviction being under a paramount title.⁸⁰ In case of sales of personal property also when there is an express or implied warranty of title, and the goods are taken from the vendee by a judgment in a suit against him by a third person, of which suit the vendor was duly notified with a request to defend, the latter is conclusively bound by such judgment.⁸¹ It was held in *Andrews v. Denison*,⁸² that—"when a party institutes a suit founded upon a title which his grantor has covenanted to warrant, and the defendant sets up a title adverse to and inconsistent with the title thus warranted, the grantor may be notified to come in and defend against that title, in the same manner that he may be notified to defend against an adverse title set up in an action against his grantee. And when so called in, he will, in the same

⁷⁸ *Preslar v. Stallworth*, 37 Ala. 402.
Fletcher v. Jackson, 56 Am. Dec. 98.
⁷⁹ *Smith v. Crompton*, 3 B. and Ad. 407.
Williamson v. Williamson, 71 Me. 442.
Andrews v. Davison, 43 Am. Dec. 606.
Knapp v. Marlboro, 34 Vt. 235.
Terry v. Drabenstadt, 68 Pa. St. 400.
Lord v. Cannon, 75 Ga. 300.
Beyer v. North, 8 N. E. R. 576.

St. Louis v. Bissell, 46 Mo. 147.
⁸⁰ *Hardy v. Nelson*, 27 Me. 525.
Walton v. Carr, 67 Ind. 164.
Roper v. Rowlett, 7 Lea. 320.
⁸¹ *Everling v. Holcomb*, 74 Iowa. 722.
Clements v. Collins, 59 Ga. 124.
Ryerson v. Chapman, 66 Me. 567.
⁸² 16 N. H. 460.

manner and to the same extent, be bound by the result of the litigation." It can make no difference that there are intermediate purchasers, and that the suit is against the last one, as all the individuals who have sold the property are alike warrantors and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice.⁸³ It was held in *Smith v. Moore*,⁸⁴ that the right of a vendee to give notice to his vendor, and thus conclude him by the judgment, was limited to questions of the title, and could not be extended to a case in which the quality of goods sold, and not the title thereto was in question at issue. But the principle is often applied to cases where the dispute is not as to the title to the chattel, but as to some collateral matter. Thus in *Carpenter v. Pier*,⁸⁵ it has been held that if a person guarantees anything whether real or personal to be of a specified quality or character, he may be brought in privity with an action, to which his guarantee is a party, involving the character or quality of the thing guaranteed. If on notice given he neglects to prosecute the suit, and the defence of the invalidity of a note is successfully made, he may not, in a subsequent suit between himself and his vendee, show that the note was not valid.

The same view appears to be taken by all modern Jurists. The Romans went much further on account of their theory of *tacit mandat*, which has not been adopted in its entirety even in countries, the Jurisprudence of which is derived directly from that of Rome. Lacombe, in explaining the salient difference in regard to this matter between the Roman and the French Jurisprudence says:— "*Les jurisconsultes romains admettaient que toutes les fois que le garant soutenait le procès sur l'objet garanti au vu et su du principal intéressé, ou après que sommation avait été faite à celui-ci d'assister au procès (denuntiatio litis), la décision du juge emportait autorité de la chose jugée pour ou contre ce dernier. Un texte nous fait connaître trois applications de ce principe et à titre d'exemple seulement : 'Veluti si creditor experiri passus sit debitorem de proprietate pignoris, aut maritus socerum vel uxorem de proprietate rei in dotem acceptæ, aut possessor venditorem de proprietate rei emptæ.' Le motif de cette décision nous est donné par la même loi :*

'quia ex voluntate ejus de jure quod ex persona agentis habuit judicatum est' : C'était donc un cas de mandat tacite basé sur le principe général : *'semper qui nom prohibet intervenire, mandare creditur.'* Notre législation n'a pas accepté cette théorie du mandat tacite, et il ne suffirait pas, pour qu'un jugement fût opposable à une personne qui n'y a pas été partie, qu'il fut démontré qu'elle avait connaissance du procès engagé. Nous devrions toutefois admettre la même solution que dans le droit romain, au cas où ce serait réellement d'après une convention tacite de mandat que la partie intéressée aurait laissé son garant agir en justice à son lieu et place. La réalité des faits doit, dans cette espèce, l'emporter sur l'apparence.⁸⁶

106. On the same principle, if partners are sued, and one of them being without the State, is not served with process, and the others notify to him of the pendency of the suit, the judgment, even if he refuses to participate in the suit, will be conclusive against him in a suit by the others for contribution.⁸⁷ The principle is in fact of quite a general application. Thus Mr. Herman⁸⁸ says:—"A defendant may call upon any one whose liability for the cause of action is primary as compared with his own, to assume the burden of defence in the action, the notice given by the defendant will be as effectual in binding such party by the judgment rendered in such action as though the notice emanated from the Court, as where the covenantee in a deed is sued for possession of the real estate by one claiming under a paramount title, the covenantee may relieve himself of the burden of defending the suit by giving notice to his covenantor of the pendency of the suit, and thereby cast upon him the duty of defending the title, and bind him by the judgment." Similarly, Dr. Bigelow says,—“Under certain circumstances interested persons are held bound by judgments when they were not in point of fact parties to the proceedings, by giving them due notice of the suit. This occurs, for example, where the party notified is liable over to the notifying party to make good any recovery by the plaintiff; the notified party having opportunity as well as

notice to appear.”⁸⁹ In *Davis v. Smith*,⁹⁰ it was said that—
 “the rule seems to be established that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defence of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not.”

The same has been held in a number of other cases.⁹¹ In *Littleton v. Richardson*,⁹² Mr. Justice Bell said:—
 “When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit and requested to take upon himself the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means of controverting the claim, as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not, for he is bound to take up the cause at that point, in exoneration of the defendant; the latter need not longer defend.” The learned Editors of the American State Reports say: “A man may become a privy by being made responsible over to another by positive law, or he may make himself a privy by covenanting for the results or consequences of a suit between other parties; and in either case the judgment will be conclusive against him; provided he be notified of the pendency of the suit, and called upon to defend the same.”⁹³
 In *Duffield v. Scott*,⁹⁴ Mr. Justice Buller, said:—“The purpose of giving notice is not in order to give a ground of action; but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the

⁸⁹ Big. Estop. 131.

⁹⁰ 79 Me. 351.

⁹¹ *Spencer v. Dearth*, 43 Vt. 106.

Pritchard v. Ferrar, 116 Mass.

Balle v. Light, 30 Am. Dec. 317.

⁹² 66 Am. Dec. 759.

⁹³ 2 Am. St.

⁹⁴ 8 T. R.

other party from saying that the defendant in the first action is not bound to pay the money." A notice calling on a person to defend a suit cannot estop him from controverting the judgment in the suit, where his non-liability need not result in a judgment in favor of the party calling him, so that where one sells property as called for by a bill of lading issued by a common carrier, and is then sued by his vendee on the ground of a deficiency in the quantity of such property, he cannot bind the carrier by asking him to defend.⁹⁵ Similarly, if one carrier on being sued for the loss of goods, gives notice of it to another carrier to whom he delivered the same for transportation, asking him to defend the suit, a judgment against the first is not conclusive of the liability of the second. "Whether such a relation exists as to make the notice an estoppel, to that extent, is an open question that may always be contested;" but, as observed by Walker, J., in *Chicago and N. W. R. Co. v. Northern Line Packet Co.*,⁹⁶ "when it is shown that the relation does exist, and that a recovery over may be had against the person on whom the notice was served, then he is estopped to deny that the judgment was recovered against his privy, that the wrong was perpetrated, or that the recovery was too large. In that case, the judgment may be read in evidence to show that there had been a recovery against the person first sued, and the amount he has been compelled to pay, as fixing the measure of damages, but the judgment is evidence for no other purpose." Nor is the person responsible over precluded by the judgment in any case, from setting up any defences which, from the nature of the suit or the pleadings, he could not have interposed in the first litigation had he been a formal party to it.⁹⁷

107. A notice to a person who is not a party to a suit with a view to estop him by a judgment in that suit must be such as to give a full, fair and previous opportunity to meet the controversy. Unless legal intimation is given, even a full knowledge of the proceedings by a person interested in their result, will not estop him from controverting the judgment.⁹⁸ It will not be enough to estop him that he

⁹⁵ *Garrison v. Babboe Trans. Co.*, 94 Mo. 130.
⁹⁶ 70 Ill. 217.

⁹⁷ Bl. Jud. 683.

⁹⁸ *Brooklyn v. Insurance Co.*, 99 U. S. 362.

knew of the suit, and talked about it, and intimated that he had evidence which would defeat the suit.⁹⁹ Nor would it be enough that he happened to be present in Court, and may have cross-examined the witnesses.¹⁰⁰ In *Barney v. Dewey*,¹ it was held that a person called as a witness might be estopped, but the weight of authority² is clearly against that view, on the ground that a witness as such, has no control over the case. In *Hersey v. Long*,³ the Supreme Court of Minnesota said, that the "notice must be clear and explicit, and convey precise information that unless the person to whom it is addressed establishes the validity of the title in the first action, he will be estopped by the judgment. But no case has decided that the notice should be in any particular form. . . . Most of the cases assume that if sufficient in substance it need not be in writing; and except for facility in proving it, and certainty as to its character, we see no reason why it should be written or formal." The rule has been very clearly laid down in *Sampson v. Ohleyer*,⁴ in which the Court said, "if a party to a suit has the right to resort to another upon his failure in the action, whether upon covenants of warranty or on the ground that he is indemnified by such third party, then it is clearly his duty to give full notice to his covenantor or indemnitor of the pendency of the suit what it is he requires him to do in the suit, and the consequences which may follow if he neglects to defend. Mere knowledge of the existence of such action is entirely insufficient to bind the party by the judgment.

i In *Robbins v. City of Chicago*,⁵ the United States Supreme Court held that "express notice is not required; nor was it necessary for the officers of the Corporation to have notified him that they would look to him for indemnity. . . . All who are directly interested in the suit and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of these rights (*i. e.*, those which distinguish parties from strangers) are equally concluded by the proceedings." The principle of that decision has been sanctioned by the New York Supreme Court. Thus in *Village of Port Jervis v. First National Bank*, the New York Court said that "persons notified of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced." This has been cited with approval in *Tahton v. City of Rochester*.⁶ The weight of authority appears, however, to be against that view.

Paul v. Witman, 3 Watts, &c., 8.
Turpin v. Thomas, 3 Am. Dec. 615.
8 Am. Dec. 372.
Blackwood v. Brown, 32 Mich.
York v. Steele, 50 Barb. 307.

Lebanon v. Mead, 64 N. H. 8.
1. 114.

² 4 Wall.
³ 28 Am. St.

Unless he is notified to furnish testimony, or to defend the action or to aid in it, he may well suppose the party to be in need of no assistance, and he may well rely upon that supposition.' It has been held in other cases also that the notice must comprise an express request to defend the case,⁷ but it has sometimes been held that, that is not essential.⁸

108. A person responsible for the consequences of a decision in a suit may also be bound by the decision, even without having been a party to or notified of it. Thus it appears to be generally agreed upon that every person who has made an unqualified

Decision in a suit will bind every person responsible for its consequences.

agreement to become responsible for the result of a litigation, or upon whom such a responsibility is cast by operation of law, in the absence of an agreement, is conclusively bound by the judgment. Thus, if one covenant for the consequences of a suit between others, as if he covenant that a certain mortgage assigned by him shall produce a specific sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive against him.⁹ So where a party whose goods were insured in the name of another with whom they were stored, after a loss, agreed with him, that a suit should be brought in his name for the use of the owner, and a suit was brought and prosecuted in good faith, but defeated without fault of the nominal plaintiff, the owner being a privy in interest, was held to be concluded by the judgment and unable to re-litigate the matter in suit against the party who had made the insurance, for an alleged breach of his agreement to insure.¹⁰ Where several Insurance Companies agree that one Company shall assume the defence, they to be bound by the judgment, an action prosecuted and judgment rendered against such Company binds them all.¹¹ A judgment against the original insurer is binding upon re-insuring Companies who had notice of the suit or an opportunity to defend.¹² In *Sevey v. Chick*,¹³ the suit was for possession against a tenant, and his lessor's title having been tried, the decision against it was held

⁷ *Savoland v. Groon*, 36 Wis. 612.
⁸ *Axford v. Graham*, 37 Mich. 422.
⁹ *Cummings v. Harrison*, 57 Miss. 275.
¹⁰ *Hoiser v. Hatch*, 86 N. Y. 614.
¹¹ *Collins v. Mitchell*, 5 Fla.

lye v. Prince, 40 Am. Dec. 2
¹² *Gofo v. Favorite*, 69 Ill. 437.
¹³ *Gnatt v. Insurance Co.*, 68 Mo. 503.
¹⁴ *Stong v. Insurance Co.*, 4 Mo. App. 7.
¹⁵ 13 Mo. 141

binding in a subsequent suit by the lessor against the grantee of the plaintiff in the first suit, on the ground that he "had made himself a party to the suit." However he had not acted as a party, and the only ground of treating him as such was that he had agreed in writing that, "his title should be tried in that action the same as though the suit were against him." But a mere agreement between several persons, by which each agrees to be bound by a verdict and to have the right to cross-examine the witnesses, will not make the decision binding on any person who would not otherwise be bound by it.¹⁴

Nor is this rule restricted to cases of contract. It was laid down in *Lowell v. Boston R. Co.*,¹⁵ that where one was compelled, by a judgment, to pay the damages occasioned by another's negligence, the amount paid might be recovered against the principal wrong-doer, though contractual relations should not exist between the parties to either action. (On the same principle, it has been held that when damages have been recovered by a judgment against a master for injuries sustained by his servant's negligence, the master not having contributed, the sum so paid by the latter may be recovered from the servant.¹⁶ The cases cited were quoted with approval in *Oceanic S. N. Co. v. Compania T. E.*,¹⁷ in which Follett, C. J., said:—"If another person has been compelled (by the judgment of a Court having jurisdiction) to pay the damages which ought to have been paid by the wrong-doer, they may be recovered from him."

109. A bailor does not claim under a bailee, but he is sometimes, on similar principles, held barred by a decision in a suit¹⁸ to which the bailee is a party. Thus, where a suit is brought against a bailee for the bailed property, and the bailor participates in or has full control of the action, and his title is put in issue in that action in order to maintain the bailee's defence, the judgment in such action is *res judicata* on the question of title, and is conclusive as to the nature and extent of such title at the time of the rendition of the judgment.¹⁹ In *Bates v. Stanton*,²⁰

¹⁴ *Patton v. Caldwell*, 1 Dall. 419.

¹⁵ 34 Am. Dec. 33.

¹⁶ *Grown v. New River Co.*, 4 T. R. 117.
Hitchcock.
Foran 31. Am

Grand Trunk Ry. Co. v. Latham, 63 Me. 177.

¹⁷ 30 Am. St. Rep. 657.

¹⁸ *Hudson Riv. R. Co. v. Barb*

the plaintiff, claiming to be the owner of certain goods, delivered them to the defendant by way of bailment; the defendant afterwards surrendered them to the true owner, taking from him an indemnity-bond. Thereupon the plaintiff sued him in trover for their conversion, and it was held that a judgment recovered by the true owner, in an action against the plaintiff involving the right to the goods, was conclusive against the plaintiff in his action against the defendant, inasmuch as the parties, though nominally different, were virtually the same on account of the interest which the true owner had in the defence of the later action by reason of the indemnity-bond which he had given to the defendant of record. In *St. Paul National Bank v. Cannon*²¹ a suit by the pledgee of a promissory note against its maker was held to be barred by a decision against the pledgor in a suit brought by him against the maker, on the ground that the pledgee had sent the note to the attorney of the pledgor for its being produced in the suit by the pledgor, as thereby the maker was subjected to the necessity of defending, and to the risk of a recovery against him. Dr. Bigelow points²² out expressly, however, that,—“Judgment obtained by or against the bailee cannot be used for or against the bailor, except in case of an action brought at his instance, or by due authority, or when he has received and retained the fruits of the judgment.”²³ It has even been held that when the previous suit is by the bailee the bar by the judgment is on the ground that a suit will lie by either, still the law will not suffer a defendant to be twice harassed for the same cause,²⁴ and therefore only one suit can be brought, and it will be a bar to any other.

110. Judgments in *personam* have, in the absence of fraud, been held to be binding against third persons as to the relationship established by them between the parties and the extent of the relationship, and the amount of the debt.²⁵ “Third persons,” as observed by Dr. Bigelow,²⁶ “cannot object when those who have the exclusive right to settle a question have done so without fraud upon them. In the absence of

²¹ 34 Am. St. Rep. 189.

²² Big. Estop. 130.

²³ *Pico v. Webster*, 12 Cal. 140.

²⁴ *Green v. Clarke*, 13 N. Y. 341.

²⁵ *Young Ex parte* 17 Ch. D. 608.

Raymond v. Richmond, 75 N. Y. 354.

Strong v. Lawrence, 58 Iowa 56.

Sidensparker v. Sidensparker, 83 Am. 527.

²⁶ Big. Estop. 151.

fraud upon them, those (not being privies) who are not, or from want of interest might not be, parties, have no concern with the judgment, and cannot attack it even for supposed want of jurisdiction²⁷ or for fraud upon others."²⁸ It has thus been held that in a suit by the creditors of a certain person to set aside a conveyance by him in fraud of them, a previous judgment of a debt in their favor against him will be conclusive against the alienee also.²⁹ In *Candee v. Lord*,³⁰ Gardiner, J., in delivering the judgment, said:—
 "In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against the latter without collusion is conclusive evidence of the relation of debtor and creditor against others: First, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently neither a creditor nor stranger can interfere in the *bond fide* litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor does not arise until the latter has violated the tacit condition annexed to the debt, that he has done and will do nothing to defraud his creditors." The weight of authority is, however, in favour of the view that though a judgment may be evidence, in certain cases, of the relationship established by it, against persons not parties to it, yet it cannot be binding against them, unless it is of the nature of a judgment *in rem*.

Law attributes verity only to the substantive as opposed to the judicial portion of the record. Almost every text writer on the Law of Evidence says that a judgment is admissible only to prove the fact, that the judgment was rendered, and there is a material difference between proving the existence of the record and its tenor, and using the record as the medium of proof of the matters of fact recited in it. As an illustration of the rule, it is generally held that a

²⁷ *Wheeler v. Robertson*, 78 Va. 612.

²⁸ *Brigham v. Fayerweather*, 140 Mass. 111.

²⁹ *Thompson v. Brown*, 27 Mich. 111.

³⁰ 51 Am. Dec. 294.

judgment by a creditor against a surety is evidence in an action by the surety against the principal debtor, of the amount the surety has been compelled to pay, but not of his liability to pay it.³¹ Mr. Field says³² “It is a general rule, which has been acknowledged and followed in India as well as in England, that a judgment in a criminal case (unless, indeed, admissible as evidence in the nature of reputation) cannot be received in a civil action to establish the truth of the facts upon which it was rendered, and that a judgment in a civil action cannot be given in evidence for such a purpose in a criminal prosecution.”³³ In suits brought to set aside alienations made by Hindu widows and other persons, who have not an absolute and complete interest in the property alienated, the question is often raised, whether or not the alienation was made for necessary purposes. In order to prove such necessity, decrees are frequently produced without evidence being given of the circumstances under which the debts were contracted, for the recovery of which these decrees were obtained. Upon the principle above stated, it might appear that such decrees, though good evidence of the amount paid, are not evidence, at least on behalf of the alienors, of the facts constituting the necessity.”

CHAPTER V.

ESSENTIAL JURISDICTION.

111. A decision to be *res judicata* must be of a Court of competent jurisdiction. The term **General conception of jurisdiction.** Court itself connotes a Court regularly constituted by the Government of the territory in which it may be situate. "Jurisdiction cannot be predicated of any voluntary or self-constituted tribunal, lacking the color of Governmental authority."¹ The legally constituted Courts of a *de facto* Government and the *de facto* Courts of a lawful Government, are both Courts that can have legal jurisdiction. A Court is said to be of competent jurisdiction with regard to a suit, when it has authority to hear and determine that suit.² The conception of jurisdiction, however, is not quite the same in all countries and varies at different times even in the same country, the variation consisting chiefly in the extent to which the restraints attaching to the mode of the exercise of the jurisdiction in any case are included in that conception itself. The earlier conception was generally the broadest, and has not quite disappeared even now. It was defined as *potestas de publico introducta cum necessitate iudicendi*. It was even said to be the "right by which judges exercise their power." Baldwin, J., in delivering the judgment of the United States Supreme Court in *State of Rhode Island v. State of Massachusetts*,³ said: "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power there." In *Ex parte, Reed*,⁴ the same Supreme Court described jurisdiction as "the power to hear and determine and give the judgment rendered." The Iowa Supreme Court defined jurisdiction to be "the authority of law to act officially in the matter then in hand."⁵ The Pennsylvania Supreme Court defined it as the power and authority to declare the law.⁶ The Supreme Court of California still further widened the

Bl. Jud. 262.
 Sheldon v. Newton, 3 Ohio. 491.
 United States v. Arredondo, 6 Pet. 709.
 12 Peters. 657.

¹ Jones v.
² Miller v. C.

conception, and said :—" It is in fact the power to do both or either ; to hear without determining, or to determine without hearing." The Indiana Supreme Court defined it as " authority to move in a cause,"⁸ and even as " any movement in a cause."⁹

On the other hand, it has even been defined merely as the " power to inquire into the fact, to apply the law and declare the judgment in a regular course of judicial proceeding."¹⁰ There is a clearly defined attempt discernible in recent cases to restrict the definition of jurisdiction in all directions. Some Courts have tried to escape from the position that the judgment of a Court having jurisdiction to hear and determine is conclusive, by adding to its definition a new element, *viz.*, that jurisdiction is not merely the power to hear and determine, but also to render the particular judgment which was rendered.¹¹ In *Ex parte Walker*,¹² the Alabama Supreme Court said : " Jurisdiction is the power or authority to pronounce the law on the case presented, and to pass upon and settle by its judgment the rights of the parties touching the subject-matter in controversy, and to enforce such sentence." The Louisiana Supreme Court spoke of it in *Succession of Weigel*,¹³ as a power constitutionally conferred upon a judge or magistrate, to take cognizance of and decide causes according to law, and to carry his sentence into execution." In *Stuart v. Anderson*,¹⁴ jurisdiction over the non-resident defendant had been acquired by the Court, but subsequent to that the plaintiff amended the claim by introducing an entirely new cause of action, and the Supreme Court of Texas held the judgment void on the ground of want of jurisdiction over the defendant.

There is a similar conflict of opinion even among the writers. Messrs. Vanfleet and Hawes are in favour of the broadest conception of the term. The former approves as the best, the definition given by Green, C. J., who in *Perrine v. Farr*,¹⁵ defined jurisdiction merely as 'power.' The latter adopting the language used by the Massachusetts Supreme Court in *Hopkins v. Company*,¹⁶ observes¹⁷ that jurisdiction " embraces every

⁸ *Bennett Ex parte*, 14 Cal. 87.

⁹ *c. Aldett*, 52 Am. Rep. 632.

¹⁰ *in c. Jacobs*, 22 N. F. R. 333.

¹¹ *ins c. Com.*, 3 Mete. 9.

¹² *King c.*

¹³ *Ex parte Cuddy*, 131 U. S. 280.

¹⁴ *c. Allred*, 57 Ala. 628.

¹⁵ *c. Columbian*, 5 Cal. 99 Mass. 22.

¹⁶ *Fithian c. Monks*, 13 Mo. 502.

¹⁷ *Seamster c. Blackstock*, 2 S. F. R.

¹⁸ *Anthony c. Kasey*, 83 Va. 338.

¹⁹ 25 Ala. 281.

²⁰ 17 La. An. 70.

²¹ 8 S. W. R. 295.

²² 22 N. J. L. 365.

²³ 3 Mete. 462.

²⁴ Haw. Jur. 3.

kind of judicial action upon the subject-matter, from finding the indictment to passing the sentence." On the other hand, Mr. Herman defines jurisdiction to be the right to pronounce judgment, acquired through "due process of law," which, he adds "imports the right of the person affected thereby to be present before the tribunal which pronounces judgment, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved," and "means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights."¹⁰ Mr. Black, also defines jurisdiction to be "the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a Court or Judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the Court in some manner sanctioned by law as proper and sufficient."¹¹

112. As to the constituents of jurisdiction, Mr. Black says,—“Jurisdiction naturally divides
 Constituents of ju- itself into three heads. In order to the
 risdiction validity of a judgment, the Court must have jurisdiction of the persons, of the subject-matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has never been notified of the proceeding. It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination.”¹² It has been further laid down that “before jurisdiction can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that

such person or thing has been properly brought before the tribunal, to answer the charge therein contained."¹³ There is a general unanimity of opinion, however, that jurisdiction over the subject-matter of a suit is the most essential constituent of the jurisdiction over the suit, and may therefore for ease of reference be designated essential jurisdiction. The subject-matter of a suit, when reference is made to questions of jurisdiction, is defined to mean the nature of the cause of action and of the relief.¹⁴ In fact, jurisdiction has been described as the right to adjudicate concerning the subject-matter in a given case,¹⁵ as the right "to determine the controversy or question in issue between the parties or grant the relief prayed." "Jurisdiction over subject-matter is a condition precedent to the acquisition of authority over the parties,"¹⁶ which also is generally held to be essential for jurisdiction. Speaking of the nature of such jurisdiction, Folger, J., observed in *Hunt v. Hunt*,¹⁷ that it was "power to adjudge concerning the general question involved,"—"power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."

113. Jurisdiction over subject-matters primarily depends on the nature of the cause of action alleged and of the relief asked. Jurisdiction over subject-matter is determined by plaintiff's statement of claim. It does not depend upon facts, or the actual existence of matters and things, but upon the allegations made concerning them. Mr. Vanfleet says,—“If certain matters and things are alleged to be true, and relief prayed which the tribunal has power to grant, if true, that gives it jurisdiction over that proceeding,” and that a great deal of “trouble has arisen from the mistaken conception that jurisdiction depends upon facts, or the actual existence of matters and things, instead of upon the allegations made concerning them”; and that such a mistaken conception has caused Courts to hold that judgments on paid claims, or claims barred by the Statute of Limitations, were void.¹⁸ In *Two Rivers Manufacturing Co. v. Beyer*,¹⁹ the Wisconsin Supreme Court observed that the continued existence of plaintiff's right to

¹³ *Sheldon v. Newton*, 3 Ohio 494.

¹⁴ *Cooper v. Reynolds*, 10 Wall. 316.

¹⁵ *Munday v. Vail*, 34 N. J. Law, 422.
 v. Blair 24 Am. St. Rep. 309.

Fr. Jud.

Am. Rep.

¹⁶ *Law. Col. Att.* 71

¹⁷ 17 Am. St. Rep. 111.

recovery was essential to the continuance of the jurisdiction of the Court over the subject-matter, and therefore if he, after bringing the suit should accept payment of the demand sued upon, and subsequently take judgment therefor, it would be void, because the subject-matter of the action had been extinguished by its payment." Mr. Freeman says—"This decision is based upon a mistaken conception of the subject-matter of the action. It is not the existence of a cause of action which constitutes the subject-matter, but the allegation of such existence. The allegation may be found on judicial investigation to be false; but this is not equivalent

"The decision in this case was that the Court had not jurisdiction to award costs as the proceedings were statutory and the statute did not authorize an award of costs. Orton, J., in the judgment of the Court laid it down as a firmly established doctrine, "that although the Court may have jurisdiction of the cause, it might lose it and do acts in the same without the authority of law that would be void for want of jurisdiction." It was only incidentally that the learned Judge said, "The cause was disposed of and determined by the removal of the cause of action therefrom. The jurisdiction of the Court in that action was terminated. Has the Court jurisdiction to hear and determine and render judgment in a pretended action, when no cause of action is shown or claimed. No more has the Court the jurisdiction to continue the action and render judgment therein, after the cause of action has been withdrawn from it or is out of it any way. It has no jurisdiction except to dismiss it or expunge it from the records. If there never was or there is no longer any subject-matter of the action, then there is no jurisdiction." The Editors of the American State Reports after observing that this reasoning is somewhat startling, say "It subjects judgments to collateral assault, after unquestioned jurisdiction over the parties has been obtained, because of the occurrence of facts *pendente lite* not capable of ascertainment from the files and records, and to which the attention of the Court was not directed. It declares that a judgment may be pronounced void because the Court, during the pendency of the action, ceased to have jurisdiction over the subject-matter, and that it ceases to have such jurisdiction when the demand sued for has been satisfied. The error of the Court, as we conceive, arose from its assumption that the debt or demand sought to be enforced was the subject-matter of the action. If this assumption be correct, then the necessity for a demand or debt or other right of action in the plaintiff, at the commencement of his proceedings, ought also to be affirmed as an essential of jurisdiction. For, surely, if a Court cannot exercise jurisdiction because a cause of action has been extinguished, it must be equally powerless if no cause of action ever existed. It is not the debt, demand, or right to relief which constitutes the subject-matter of jurisdiction, for the exercise of the jurisdiction often results in the judicial establishment that the plaintiff had no debt, demand, nor right to relief. In that event, the Court is not ousted of jurisdiction, and required to dismiss the action. Its duty is, rather, to proceed to render judgment, on the merits, against the plaintiff, and in favor of the defendant. The subject-matter of jurisdiction is to be found in the allegations of the litigants, and not to be ascertained outside of them. If the complaint filed presents a case entitling the plaintiff to the action of the Court, then there is a subject-matter, though no evidence can be adduced to support any of the allegations in the complaint, or though all of them may be subsequently disproved, or confessed to be untrue. If, by any means, a complaint once filed in Court could be withdrawn from the files, so that the Court could have no further right to consider whether it was true or false, or to grant either party any relief, if true or false, or if, while the complaint remained on file, the Court were either destroyed, or its powers so restricted that it no longer had authority to consider the complaint, or to grant relief to either party, then a case would be presented, either of the withdrawal of a subject-matter from jurisdiction, or of the withdrawal of jurisdiction from a subject-matter. The change, on the one hand, would be apparent from some action taken in Court, and to be ascertained from its records or files, while, on the other hand, loss of jurisdiction would be disclosed in some statute or constitution destroying or diminishing the powers of the Court.

to a finding that there is no subject-matter of the action, and, instead of demonstrating that the Court cannot proceed further, makes it incumbent upon it to pronounce final judgment. The discharge of a cause of action by payment after the commencement of a suit can no more divest the jurisdiction of the Court than the payment of the same cause of action before suit was brought could have made it impossible for the Court to entertain the action and to require the defendant to appear in response to its process."²⁰

The Courts also have repeatedly held the same. Thus in *People v. Sturtevant*,²¹ Johnson, J., said, that the existence of jurisdiction does not involve "the existence of an equity (right) to be enforced, nor the right to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the Court is entirely consistent with a denial of any equity (right) either in the plaintiff or in any one else. . . . Have the plaintiffs shown a right to the relief which they seek? and has the Court authority to determine whether or not they have shown such a right? A wrongful determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction." In *Whittlesey v. Frantz*,²² the Court of Appeals of New York said,—“The jurisdiction of the Court to entertain the proceeding did not depend upon the truth of the facts alleged in the petition . . . and whether it decided rightly or not was not a matter affecting its jurisdiction.” In *Bolghiano v. Cooke*,²³ it was held that where the allegations of a plaint were sufficient to give jurisdiction, defective proof could not

If anything occurs *pendente lite* terminating a plaintiff's right to recover, surely this does not destroy jurisdiction, but rather requires that jurisdiction shall, on proper supplemental pleadings, be exercised over the changed condition of affairs to the end that the cessation of the right of recovery be judicially established. In the principal case, the alleged payment of the cause of action might doubtless have been made known to the Court by proper supplemental pleadings, on which issues might have been formed and evidence received. Neither the pleading nor the evidence could have shown that there was no longer a subject-matter of jurisdiction. They would rather tend to exhibit an additional subject-matter, viz., an issue respecting an alleged discharge *pendente lite* of the original cause of action. The establishment of the issue tendered by the defendant would not oust the Court of jurisdiction. If it did, the judgment should be merely of dismissal of the action for want of jurisdiction, leaving the plea of satisfaction *pendente lite* undetermined; for if a Court has not jurisdiction, it can do nothing beyond proclaiming that fact."²⁴

¹⁹ 17 Am. St. Rep. 143.

²⁰ Fr. Jud. 203.

²¹ 50 Am. Dec. 534.

²² 74 N. Y.

²³ 11

affect it. In *Darling v. Conklin*,²⁴ the Court had jurisdiction only up to \$ 200, and Ryan, C.J., said, that if the plaintiff had not stated the value of the chattels sued for or had stated it over that amount, the Court would not have had jurisdiction, whatever the value might be in fact, and the whole proceeding would have been *coram non iudice*, but the plaintiff's statement of the value gave jurisdiction to the Court, which rested on that statement "independently of the value of the chattels in fact, until his judgment should determine the value. . . . When that found the value to exceed \$200, the jurisdiction of the action, derived from the affidavit, ceased for all purposes except the statutory judgment of abatement, independently of the value in fact. But that determination ousted the jurisdiction only thenceforth ; it did not operate to defeat the jurisdiction theretofore conferred by the affidavit."

In England, Lord Chief Justice Denman said in *Reg. v. Bolton*,²⁵ that "the question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature ; it is determinable on the commencement, not at the conclusion of the inquiry." The same has been held repeatedly in this country. For instance, Mr. Justice Wells observed in *Sikur Chund v. Sooring Mull*,²⁶ that "the jurisdiction of the Court could not be taken away because the evidence was defective."

114. Jurisdiction over subject-matter, like all other jurisdiction, is conferred by the sovereign authority which organizes the Court, and is, as a general rule, to be sought for in the general nature of its powers or in the authority specially conferred.²⁷ In India it is prescribed and regulated by positive law, and mostly by the Acts of the Indian Legislature. It depends primarily on the nature of the suit, and Sec. 11 of the Civil Procedure Code broadly lays down that "the Courts (Civil) shall, subject to the provisions contained (in the Code), have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force." The word 'civil' is a very comprehensive word, admitting of a variety of different significations, but as qualifying the word 'suit,' it

Civil Courts can take cognizance of all suits of a civil nature.

²⁴ 1 Hyde, 272.
²⁵ *Cooper v. Reynolds*, 10 Wall. 316

cannot be understood as synonymous with 'municipal' or even as the opposite of 'criminal.' In *Kodiyalam Rungasami v. Sudersana*,²⁸ Mr. Justice Holloway after observing, that it was not used as an antithesis to ecclesiastical, said that "civil nature means such rights as are vested in the citizen, and fall within the domain of private and not of public law."

115. Suits relating to merely religious matters and brought merely for regulating the ritual of religious or social character or for mere observance of religious honors have always been held to be not of civil nature, and beyond the cognizance of Civil Courts. In *Sri Sunkar v. Sidha*

Lingaya Charanti,²⁹ the suit was to claim for the Swami (a chief priest of the Samartava sect of Brahmans) the exclusive right of being carried crosswise on the high road in a palanquin on ceremonial occasions in virtue of a grant from the ruling power to a predecessor of his in office, and it was held by the Sadar Court of Bombay on a remand by their Lordships of the Privy Council not to be maintainable.³⁰ This decision was followed by Westropp, C. J., and Melvill, J., in *Sangapa v. Gangapa*,³¹ in which case the plaintiff claimed a declaration of his right to take a *cupola* to a certain temple, and to place it upon the car of the idol, and to take a *nandicola* (bamboo) with *tom toms* from his house to the temple, and to offer the first cocoanut to the idol at the annual festival held in honor of a certain Lingayat Saint, but the suit was held not to be maintainable as it had been brought to vindicate plaintiff's right, not to an office, but to a mere dignity unconnected with any fees, profits or emoluments. The same view was enunciated by the High Court of Bombay in *Vasudev v. Vamraji*,³² in which the suit was brought by the plaintiffs, "as members of a Committee of

²⁸ The Bombay High Court in *Narayan Sadanand v. Balakrishna*,³⁰ no doubt held that where the plaintiffs enjoyed the exclusive right of breaking, on a certain day, a curd-pot in a particular part of the temple, the defendants' breaking of their own curd-pot on that day in any part of that temple was a violation of that right, entitling the plaintiffs to damages for which a suit would lie in a Civil Court. No question was raised however in that case as to whether the suit would lie, and the decision has not been followed.

²⁹ XI M. J. 422.

³⁰ I. L. R., II Bom. 473 (n).

³¹ IX B. H. C. R. 418.

³² I. L. R., II Bom. 476.

³³ I. L. R., V Bom. 80.

management of a Hindu temple, to compel the defendants, who are hereditary *pujaris* or priests of the temple, to take out certain ornaments from the treasury of the Managing Committee, and to place the same upon the image of the god, on such high days and holidays as may from time to time be appointed by the Managing Committee; and, further, to obtain a declaration that the said ornaments, after they have been so taken out of the treasury, are in the custody of the defendants, and that the defendants are responsible for their safe keeping." No objection was taken as to the jurisdiction of the Civil Courts in the Lower Court, or even in the memorandum of appeal to the High Court; but the High Court held that the Civil Courts had no jurisdiction over such a suit, observing that "it is for those who profess any form of religion to adopt such ritual as they think fit, and to make and enforce such rules as may be necessary to secure its due observance. With such matters the Civil Courts have nothing to do, unless and until they result in an infraction of civil rights." On the same principle it was held by Melvill and Pinhey, JJ., in *Rama v. Shivram*,³ that a suit would not lie in a Civil Court for a declaration that the plaintiffs had the right of parading their bullock on a certain day of one year and the defendants on a certain day of another year, and for an injunction restraining the defendants from interfering with the plaintiff's said right. There was an agreement between the parties in this case by which the plaintiff's right was recognized, and a penalty provided for its invasion. But Melvill, J., observed, "This was equally the case in *Sangapa v. Gangapa*. The law applicable to such questions was clearly laid down in that case; and I am in no way disposed to depart from it, and to involve the Civil Courts in the determination of trivial questions of dignity and privilege, which are much better left to the decision of the society in which they arise." This decision was, in its turn, followed by Sir Charles Sargent, C. J., and Nanabhai Haridas, J., in *Narayan Vithe v. Krishnaji*,³¹ in which the suit was brought on the basis of an agreement between the parties, for restraining the defendant from obstructing the plaintiff in the enjoyment of certain *mîns* and the performance of *Jagars* in connection therewith, and Sir Charles Sargent, in deliver-

ing the judgment of the High Court, said—"They (*máns*) consist in the right to be the first to worship the deity on the occasion of certain public religious ceremonies, and to be the first to send *deshruth* and strike the game on certain other religious festivals. The trifling gifts made by the priest of rice, a cocoanut and *vida* on the occasion of worshipping the deity and of the piece of venison on the other occasions cannot be regarded as 'emoluments.' They would appear to be merely symbols of recognition and marks of respect of and to the holders of the *máns*."

In the Madras Presidency also, the Sadar Court held,³⁵ that a suit brought to regulate the ritual of a pagoda service was not of a civil nature;^c and this decision was approved of by the High Court in *Striman Sadagopa v. Kristna Tatachariyar*³⁷ in which Sir Colley Scotland, C. J., said—"By merely affixing a money-value, the plaintiff of course cannot give himself a right to sue which he does not otherwise possess. Now though the word 'emoluments' as well as the word 'honors' is used in the plaint, and doubtless ordinarily means temporal gains, profits and advantages, in respect of which a right to bring a civil suit clearly exists, yet we must look in this case to the items of claim in the schedule to which alone the word applies, and these clearly show that every one of the

^c The particular grounds of contention in this suit were 'at what time the plaintiffs might join the defendants in the recitation of a prayer, which of the plaintiffs was entitled to do so, whether the plaintiffs' priest was entitled to a blessing to be pronounced at the conclusion of the prayer, whether a hymn might be sung in his honor, whether certain festivals . . . were to be kept, and whether the images might be taken out in procession.' "Were any pecuniary considerations" said the Court "involved in the issue of the suit, the Court would have no hesitation in treating the suit upon its merits; but such is not the case. The contest relates purely to the constituents of religious worship, and in no respect embraces any civil rights. So clearly is this its character, that the plaintiffs have not even thought of alleging their title to any compensation from the defendants by suing for damages. They simply require at the hands of the Court the regulation of their ritual. Matters of mere ceremonial or religious usage have certainly hitherto on various occasions come before the Court, and have elicited their judgment on the points in dispute, and the whole question, whether or not the Court really possessed any jurisdiction over such disputations, was fully gone into on the disposal by them of Ap. No. 125 of 1858."³⁶ On that occasion the Bench were not unanimous in their decision, but the opinion of the majority was in favor of exercising the jurisdiction. The Court have given that decision and the arguments of counsel upon the question their careful consideration, and the opinion at which they have arrived is that they possess no jurisdiction to warrant their pronouncing judgment upon subjects such as are now in issue. It required, in the parent country, the creation of a special tribunal to undertake to regulate mere religious usages, unassociated with contract, and the operation of that tribunal has been confined to the protection of the interests of the form of worship of the State. The Court have had no such special powers conferred upon them. They are in the position of the ordinary civil tribunals of the parent country, whose want of such powers led to the erection of the ecclesiastical Court."

matters in respect of which the suit is brought, is purely a matter of religious and sacred observance in connection with the worship and ceremonials at the pagoda, and is claimed by the plaintiff as a matter of devotional respect and display due to his priestly rank or as a votive offering made to him whilst passing in procession through the temples, and when brought to the presence of the principal idol. Furthermore, it appears and is admitted that the office of '*gurukkal*' relates to the Hindu religion generally, and that all the offerings and devotional honors are claimed at this pagoda in common with those at other pagodas which the plaintiff might choose upon occasion to visit. He is not officially connected in any way with the management or control of the pagoda, or its property or funds; and the alleged dues of his office have no doubt been owing to the great reverence at one time for his sacerdotal rank in the Hindu religion, and the importance from a religious point of view of his mere presence at the pagoda. Substantially, as it appears to me, all the honors and emoluments in respect of which damages are sought, are in themselves matters purely of religious ceremonial and devotional observance, and are connected with a priestly office, which, as regards the *dharmakartas* and worshippers at the pagoda in question has attached to it no other claim of right than that which rests upon the religious feelings which they, in common with other Hindu worshippers, entertain for the sacred position of the plaintiff. Such honors and emoluments cannot in any respect be considered as remuneration for duties or ministrations performed by the plaintiff in the secular affairs or religious services of the pagoda. Nor can it, I think, be said that the defendants as trustees of the pagoda-funds are compellable in law to expend those funds in defraying the costs of those honors and emoluments. There is no doubt that the Civil Courts will recognize and enforce the rights of persons holding offices connected with the management and regulation of pagodas; and if the holder of such an office were entitled to remuneration for his services in the way of salary or otherwise, he would have a civil right entitling him to maintain a suit, if that remuneration were improperly withheld. So, too, suits are commonly entertained for the purpose of trying and deciding who are fit and proper persons of right entitled

to be appointed *dharmakartas* of a pagoda. In such cases it will be found that the offices are of a secular character, and are so dealt with, though religious duties are attached to them—the occupants being employed to exercise business functions, either as trustees and managers of the property and funds of the pagoda, or as overseers in the regulation of its affairs generally, and having necessarily civil rights and liabilities which may properly be made the subject of a civil suit. But nothing of this kind can be said of the plaintiff in his purely religious office of *guru*. The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature. Of such obligations the present Civil Courts cannot take cognizance.”^d

In *Karuppa Goundan v. Kolanthayan*,³⁸ the plaintiff alleged that he and his ancestors had possessed for 30 years the privilege of receiving before others sacred ashes, sandal, betel and nut, flowers, &c., at certain pagodas on festival and other days, and sued for an injunction forbidding defendant from interfering with the same, and Kindersley and Muttusami Ayyar, J.J., held that the suit would not lie as it was not for an office or for a money-value but for an honor because the commercial value of the offerings would be the same, even if the plaintiff received them after the other members of the family. In *Maine Moilar v. Islam*,³⁹ certain Moplahs sued certain other Muhammadans to restrain them from reading the *Khutbah* in their own mosque, and though the suit was dismissed on the ground of there being no cause of action, Sir Arthur Collins, C. J., and Wilkinson, J., said:—“It is not the province of the Courts to determine what is, or what is not, contrary to the Muhammadan religion, or to decide what religious service different sects of a community may hold in their own places of worship, provided the holding of such services cause no disturbance or illegal annoyance to the rest

^d This decision is not inconsistent with the explanation attached to the section, as the suit was not held to be not of a civil nature, but simply not cognizable by Civil Courts, because the substantive law applicable was held not to recognize such a right as was sought to be enforced in the suit, because the office to which the right was claimed was held not to be an office at all in the eye of the law.

of the community, or does not infringe on the rights of their co-worshippers." The view taken by the Madras High Court in some other cases is not quite in accordance with the above decision. Thus in *Vengamuthu v. Pandaveswara*,⁴⁰ a dancing girl's offerings to the idol were rejected by the officiating priest on the ground that she had been guilty of misconduct. She sued for damages as well as for future injunction, and the High Court held, that the suit would lie, observing that—"members of a sect are entitled, subject to the rules made by the duly constituted authorities of the sect, to take part in the public worship of the sect, and if any one of them is wrongfully prevented from so doing, he is entitled to seek from the Civil Courts such remedies as they can afford him." So also in *Venkatachalapati v. Subbarayadu*,⁴¹ a Brahman having married a widow was not allowed like other Brahmans to enter the *sanctum sanctorum* of a certain temple, and he sued for damages for the wrongful exclusion, and also for a declaration of his right to go there for worship, and Muttusami Ayyar and Shephard, J.J., held that the suit would lie in the Civil Courts, as "the right was, in its nature, one which the appellant was at liberty to assert as a citizen and a Brahman and which the Courts were bound to adjudicate upon."

a The learned Judge further said in this case,—“It may be that an inquiry as to religious or caste usage, or as to the religious foundation for the excommunication pronounced by the chief priest of Smarta Brahmans, is indispensable to coming to a correct decision, but when the right claimed is asserted to be of a civil nature and one which is within the cognizance of Civil Courts, they are bound to hold such inquiry as is ancillary to the exercise of the jurisdiction vested in them by law. . . . The right asserted is from its very nature not an exclusive personal right, or a right of domestic or family worship, or a right of property which may be conceived to exist independently of caste or religion, but it is a joint right to be exercised in a religious institution conformably to caste usage to the extent recognized by it so as not to contravene the equal rights of other members of the caste who are similarly interested in the institution. Any other view as to the basis of the appellant's right would be inconsistent with the doctrine of neutrality which forms part of the British judicial system as administered in India and lead to the introduction into Hindu temples of Mahomedans, out-castes, and others, who are outside their scope and for whose benefit they were neither founded nor are kept up. There is no State Church in India. Nor is there any recognized Ecclesiastical Court, and the Hindu religion is not the State religion. The only jural basis on which their respective relations to religious or caste institutions can rest is that of viewing them as endowed institutions or voluntary associations founded or formed for caste or religious purposes as evidenced by their immemorial usage, endowment deeds if any, and the pre-arranged intention of those who founded them. It is in such intention or the original trusts of the institution that a rule of decision must be found in the case of a dispute between the orthodox party and the dissenters. The same principle was laid down in *Attorney-General v. Welsh*,⁴² where an endowment was made for a society of Presbyterians in communion with the Church of Scotland and the ministers and majority of the congregation seceded to the Free Kirk. It was held that the minority who still clung to the Church of Scotland was entitled to

⁴⁰ I. L. R. VI Mad. 151.⁴¹ I. L. R. XIII Mad. 203.⁴² 4 Haro. 572.

116. The Explanation attached to Sec. 11 is by no means against the general view of the Indian High Courts. It only provides that a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend on the decision of questions as to religious rites or ceremonies. It introduces no new law, but merely declares and enacts the law, as it had been always administered by the Courts; and it follows even from it by implication that suits as to religious rites or ceremonies which involve no question of right to property or to an office, are not regarded by the Legislature as suits of a civil nature.⁴⁵ The principle of the Explanation was thus acted upon by the Madras High Court in *Archakam Srinivasa Dikshatulu v. Udayagiry Anantha Charlu*⁴⁶ and in *Narasimma Chariar v. Sri Kristna Tata Chariar*.⁴⁵ In the former case, the suit was for damages by the priest of a temple for the invasion of his right to sit on certain occasions on the right side of the idol, and it was held to be cognizable by Civil Courts. "There is here no question," said the High Court, "of the regulation of religious ritual as was the case in Special Appeal No. 94 of 1861, or of a right to votive offerings or payment of respect by the wardens and worshippers of the temple, such as was claimed in the case reported in I. M. H. C. R. 301. The question here relates to a right appertaining to an office in the temple, and the decision of the High Court in Original Suit No. 79 of 1865, bears us out in the conclusion which we have arrived at as to the jurisdiction of the Civil Courts in suits in which a right is claimed in connection with religious

keep the endowments and to appoint another minister. Hindu temples being religious institutions founded, endowed, and maintained, for the benefit of those sections of the Hindu community who conform to certain recognized usages as those of the castes for whose benefit the temples are by immemorial usage dedicated as places of worship, persons who conform to those usages stand to the managers for the time being in the relation of *cestui que trustent* by reason of an implied contract; and if a few secede and transgress such usages, the managers would be acting within their rights if they could say — 'We have according to the usage of the institution to admit into the inner shrine for the purposes of worship only those Brahmans who conform to the general usages of their caste — you have transgressed the caste usage in respect of marriage and we cannot admit you to that part of the temple to which those who conform to the are alone admitted according to the original trusts of the institution.'

⁴⁵ *Vasudev v. Vamuni*, I. L. R. V. Bom. 50.

⁴⁶ IV M. H. C. R.

⁴⁵ VI M. H. C. R.

worship which is not a mere matter of religious ceremonial, and which does not trench on the rights of the worshippers at a temple to show to the claimant or to withhold from him reverence or respect." In the latter case which also was held cognizable, certain Brahmans sued the trustees of a certain temple for the recovery of Rs. 167, being the money value of certain holy cakes which they alleged they were entitled to receive from the defendants for commencing the recital of a certain Sanscrit verse and for reciting a certain Tamil chant, which offices they had the hereditary right of performing in the said temple, the defendants denying the plaintiff's right to commence the recital of the said verse and chant. "In order to find the plaintiffs entitled to the sum claimed," said the District Judge, "I must decide that the plaintiffs have the right of commencing the recital of the verse and chant for which the said cakes are given, that is, I must adjudicate a question of religious ceremonial and devotional observance in a Hindu temple. This seems to me to be a matter relating to the internal economy and management of the temple which the Civil Courts cannot take cognizance of." The District Judge therefore held that—"the subject-matter of the suit is not of such a nature as to entitle the plaintiffs to maintain a civil suit." The High Court, however, said:—"We are wholly unable to see how this view can be sustained. The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question because claimed on account of some service connected with religion. If to determine the right to such pecuniary benefit, it becomes necessary to determine, incidentally, the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point."

The same was held in *Krishnama v. Krishnasami*.⁴⁶ The High Court rejected the plaint, saying "The allegations respecting the *Miras* of reciting prayers, and the exclusive right of recital in a stated form and order, which the plaintiffs ask the Court to establish and to protect from infringement by the defendants, do not dis-

close a cause of action; nor in our judgment does that portion of the plaint which alleges the withholding payment of certain specified sums, which are described as 'the value of the incomes mentioned in Schedules B. and C.' A reference to the schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned. Reading the plaint and schedules together they express no more than this, that presents and offerings usually given have been withheld. If, as now alleged, the plaintiffs intended to claim emoluments or legal dues of right receivable by them for services rendered, it is sufficient to say they have failed to do this." Their Lordships of the Privy Council set aside that order, on the ground that the plaint and schedules did disclose a claim as of right to certain dues for services performed; "Schedule C to an annual payment for damages. . . . Schedule B to certain other payments in kind, presumably capable of a money value." The first item in this schedule was one Poli (a cake) due to *Adhyapakam* at the close of the 'Tiruppavai, and most of the other items were of the same character. Their Lordships did not understand those articles as consisting of mere presents made by the devout, but as certain payments in kind of the same nature as those comprised in Schedule C. At the close of Schedule B there was however 'a statement of an approximate sum claimed for presents made annually to the *Adhyapakas* by the adjoining villagers for the Tenkalai people,' and their Lordships said: "It may be that no action will lie for the recovery of this last item or in respect of the honors mentioned in Schedule A, and alleged to have been withheld from the plaintiffs." On appeal from a decision on remand in that case,⁴⁷ Sir Charles Turner, C. J., and Kindersley, J., said—"It is certainly not the duty of the Civil Court to pronounce on the truth of religious tenets, nor to regulate religious ceremony; but, in protecting persons in the enjoyment of a certain status or property, it may incidentally become the duty of the Civil Court to determine what are the accepted tenets of the followers of a creed and what is the usage they have accepted as established for the regulation of their rights *inter se*. . . . In so doing, the

⁴⁷ *Krishnasami v. Krishnama*, I. L. R. V Mad. 313.

Civil Court pronounces no opinion on the truth of the faith or creed; it regards these questions as part of a compact by which the adherents of a creed, as such, have, by their adherence to the sect, elected to be bound; and if, on other grounds, the relief sought to protect the enjoyment of such right or property is not open to objection, it is not refused because it is claimed in virtue of a religious law or a religious usage. If, then, the plaintiffs have established their title to the offices claimed, the Court is competent to protect them in the enjoyment of such offices by proper processual remedies, and to award them compensation for damages sustained by the invasion of their enjoyment."

And a suit will lie for an office, even though there are no fees attached to it. Thus Romesh Chunder Mitter, O. C. J., and Beverley, J., held in *Mamat Ram v. Bapu Ram*,¹⁰ that a suit for the establishment of a right to the hereditary title to the office of musicians to a *satra* would lie, even though the said office would bring in no profit, and said—"We are unable to concur in the view taken by the lower Appellate Court as to the meaning of the word "office" in Sec. 11 of the Civil Procedure Code. The District Judge is of opinion that a charge or a trust to which no emoluments are attached is not an "office" within the meaning of Sec. 11. A charge or a trust of a *shebait* in a temple may not be one of profit; it may not bring to the person who is employed in the trust, or in the charge, any emoluments at all. On the other hand, it may subject him to expenditure out of his own pocket; still in a case like that, if a person undertakes a trust or a charge as a *shebait*, he, in our opinion, should be considered as employed in an "office," within the meaning of Sec. 11. Many cases were cited in the course of the argument in support of the view taken by the lower Appellate Court, but none of them fully supports the view taken by the District Judge. They are to the effect that a suit for the vindication of an alleged dignity attached to an office, if the alleged dignity does not carry with it any pecuniary gain or profit, will not lie in a Civil Court. But this is not a suit for the vindication of any alleged dignity attached to any office, but this is a suit for the establishment of the plaintiffs' right to a

117. It is also a general principle, that when there are fees annexed to an office, or to the discharge of duties belonging to an office, a person entitled to the office may sue to recover them from any person who may have received them, as well as from the person primarily

by a person entitled to any office for recovery of fees annexed to it.

liable to pay them, though no suit may lie for mere gratuities of uncertain amount and of no legal obligation, which may have been altogether refused. The rule in both of its aspects was acted upon by the High Court in *Muhammad Yussub v. Sayad Ahmed*,⁵⁰ in which Arnould, J., said—"when the *kazi* himself was invited, as appears generally to have been the case among the wealthier Muhammadan families, it was almost invariably the custom to make him presents of shawls or piece-goods; these were gratuities, as distinct from fees, and as such (though considerable in amount, and capable of being averaged with some degree of certainty, taking one year with another) they were very properly admitted by the learned counsel for the plaintiff not to form an item in estimating the damages, if any, which the plaintiff has sustained by reason of the alleged misconduct of the defendant. These presents were gratuities, which, though generally given, might have been refused, and the privation of which, therefore, is *damnum absque injuria*, a loss for which there is no legal right of action. I am of opinion, that the plaintiff,

f. In *Boyle v. Dodsworth*,⁵¹ a suit by a sexton of a certain Cathedral for certain gratuities received by the defendant for showing it to strangers, was held not to lie, on the ground that the defendant might have refused to give anything; and Grose, J., pointed out that the grant only permitted the plaintiff to show the church, but that was not the grant of any office. Lord Kenyon, C. J., further said,—“If there had been regular fees due for the duties performed, and the defendant had intruded into the offices, the plaintiff might either have supported an action for money had and received or for disturbing him in his

as properly appointed Kazi of Bombay, was and is entitled to take for his own use certain customary payments as the proper fees appertaining to his office, and is consequently entitled to bring the present action for damages against any one who, by wrongfully intruding into his office has deprived him of such his fees, or a portion thereof." In *Krishnasami v. Krishnama*,⁵¹ Sir Charles Turner, C. J., and Kindersley J., after observing that a Civil Court may award damages to a person entitled to an office, said—"But in awarding damages a Court must have regard to the general principles which regulate the award of such compensation. Damages cannot be given for the injury suffered by reason of the loss of voluntary offerings, because the injury is too remote and uncertain to be safely measured. It is not the direct and natural consequence of the wrong that the persons who might have made such offerings should so far have countenanced the wrong-doer as to refuse recognition to the just claims of the persons injured, and it is possible that other causes wholly unconnected with the wrong may have influenced them to withhold their donations. On the other hand, when voluntary offerings have been actually contributed to a fund, the refusal to a person of his right to participate in the fund causes a damage which is at once the natural consequence of the injury and measurable by the Court, and so it has been held that in the former case a Court is not, and in the latter it is, competent to award damages."⁵² In respect, then, of the several questions raised in this suit, a Civil Court may take cognizance of the claim of the plaintiffs to the offices to which they assert an exclusive right, may secure them in the enjoyment of that right, and may award them damages for the invasion of their right in so far as such damages are not too remote nor too uncertain."

Among Hindus, the existence and legal character of the family or the village priest has been recognized by the British Courts from the earliest days of their establishment, and it has often been held that a priest can recover damages both from the priest who wrongly officiated at a marriage, and from the person who employed him.⁵³ In the case last

⁵¹ I. L. R. V Mad. 313.

Narayan Sadanand v. Balkrishna, 1A B
S C 151.

N. W. P. 30th September.

C. 101.
Pandorane v. Balumbhat, Bom. S. C.

cited, the defendant denied the right of the plaintiffs (village priests) to the fees for the ceremonies which his family priest had performed; but the Sadar Court gave a decree for the fees or of a sum in default, "though as the amount of the fee in each instance was deemed optional, it was left open to the defendant to escape the effect of the decree by a nominal compliance with it." In such circumstances, it is no doubt difficult for a priest to sue with effect a *jajman* who cannot be ordered to pay a definite amount. However even in England, to entitle an office-holder to a suit, the fees payable need not be of a fixed, but may be of a reasonable amount,⁵⁴ and the rule may well be the same, whereas under the Hindu system, though the amount of the priest's fee is left to the conscience and the means of the person for whom his functions are performed, yet the payment of some fee is essential to the efficacy of the ceremonies performed. And in case of an undoubted injury, the law will not refuse a remedy merely because its amount in money does not admit of precise estimate. Ordinarily payments made to other persons who may have actually performed the ceremonies in violation of the plaintiff's rights would be a fair measure of damages to award to the plaintiff whether as against those persons, or as against the *jajman* who may have employed them; as the *jajmans* by making the payments, may be taken to have practically shown, what in their opinion it was right and reasonable for them to pay. This was the measure of damages which the Sadar Court adopted in a suit against the *jajman*,⁵⁵ saying that the rule of the Court has consistently been that ceremonies are optional, but when they or any of the obligatory ceremonies have been performed, the person entitled of hereditary right to perform them is entitled to be paid his fee, whether he performed them or not. In *Dinanath v. Sadasiv*⁵⁶ also, the claim was against the *jajmans*, and the District Judge gave a decree declaring "the plaintiffs entitled to perform the ceremonies mentioned in the plaint for the defendants, and to receive from them customary fees; or if not employed, to receive on each occasion a fee equal in amount to that paid by the defendants, or any of them, to the person or persons employed by them instead of plaintiffs," and the High Court approved of it. The action in Special

⁵⁴ *Shepherd v. Payne*, 12 C. B. (N. S.) 41.
⁵⁵ *Krishnam v. Anant*, IV Morr. 3.

⁵⁶ I. L. R. III Bom. 9.

Appeal 291 of 1872 was also against *jajmans* and the plaintiff was held to have a good cause of action against them, as they had employed another Bhat but none against the Bhat whose employment had been purely voluntary. That an action would lie however against the Bhat also was taken by the High Court to be quite a settled law, in *Sitarambhat v. Sitaram Ganesh*⁵⁷ and in *Vithal Krishna v. Anantram*,⁵⁸ and it is too late to contend against it now, though it is clear that the plaintiff could not be entitled to recover from both, and that if he obtained a decree against the *jajmans* he could not obtain one against his rival Bhat also."

The same view as to the *jajman's* obligation was taken by the Bengal Sadar Court in early cases.⁵⁹ This view was soon changed, and in 1857, the Sadar Court held,⁶⁰ that although there was no doubt, but that under the Hindu Law, the office of a *purohit* was to a certain extent an hereditary one, and the British Courts had held that a *jajman* could not dismiss a faultless pandit, yet the Courts would refuse to try the question of his faultlessness and leave it to the conscience of the *jajman*. In *Roodurman v. Damodar*,⁶¹ the High Court also held that the obligation upon *jajmans* to employ a particular *purohit* was a matter merely of conscience, and not an obligation enforceable by a Court of law; and it is quite a settled law now that a *jajman* has full liberty to select and dismiss his own *purohits*, and full power to determine as to whom his offerings would be given; and a *jajman* may employ any one he may like for

VI B. H. C. R., A. C. 270.

XI B. H. C. R. 6.

II M. H. C. R. 770.

IX M. I. A. 348.

Sham Sreenivasulu Iyengar v. S. D. A., Sol. Rep. 12.

57 *Sitarambhat v. Ganesh*, 1872, III B. H. C. R. 291.

58 *Anantram*, 1872, III B. H. C. R. 291.

59 *Roodurman v. Damodar*, 1857, Cal. R. D. 100.

60 *Id.*, 1857, Cal. R. D. 100.

the performance of any services he may have to perform, and pay any fees to any one he may choose to pay. The Agra Sadar Court held the same in 1862,⁶⁵ and the Agra High Court held in *Beharee Lal v. Baboo*,⁶⁶ that a claim for *haq purohtai* would not lie, as "the *jajmans* have a right to select their own priests; there is, therefore, no office recognized in law, which office has descended on the plaintiff and conferred on him a right of suit." As a natural consequence of this view of the right of a priest, a suit by him for recovery of fees, in respect of any ceremonies will not lie against any person who officiated at them and to whom they were paid, except as for money paid and received or on the ground of contract. Thus as early as 1850, as observed by Mr. Cowell,⁶⁷ "the doctrine was established that *purohit's* fees were partly voluntary and partly payment for work and labor done; they were no longer the subject of partition on the ground of hereditary right, but might be the subject of a partnership account."⁶⁸ In *Shewan*,⁶⁹ in *Thakur v. Ragnath*,⁷⁰ and even in the case of *Jowahir v. Bhagn*,⁷¹ it was held that a suit would lie against a defendant on the ground of inheritance or contract, though it be for fees paid by the *jajman* to the defendant as the officiating priest; the correct rule being as pointed out by Trevor, J., in the last mentioned case, "that if a *jajman* in the exercise of the liberty allowed to him pays a sum as fees to an individual so as to show that they were intended for that individual, no claim can be preferred by others, though they may be joint heirs in the family *purohitship*, to the property so received, but that if the fees be paid to a person only as a member of the collective body of which he is a unit the claim is admissible, and should be decided in accordance to the rules by which ordinary cases of inheritance are decided." In *Sheo Su v. Bhooree Muhtoon*,⁷² the Calcutta High Court said: "A suit for fees voluntarily paid to one man will not lie (against him) on the part of another, when there is neither contract nor tangible property; but, when the parties claim the collections of a shrine, either in right of property in the place, or of lawful and established office

⁶⁵ 1862, N. S. D. D. 64.

⁶⁶ 11 Ag. 80.

⁶⁷ 1 Cow. H. L. 64.

⁶⁸ *Hargobind v. Bhavany Purohit*, VII Cal. S. D. D. D. 206.

⁶⁹ *Shewan v. Ragnath*, VII Cal. S. D. D. 108.

⁷⁰ 1862 Cal. S. D. 4.

⁷¹ 1867 Cal. S. D. 2.

⁷² 1867 Cal. S. D. 102.

⁷³ III W. R. 11.

attached to it, it is well established that the suit will lie." In *Becharam v. Thakoormonee*,⁷⁵ the High Court held, that a suit would lie by the widow of one of the joint members of a family for her share of the fees realized by them as *purohits*, Kemp, J., observing in the judgment of the Court:—"It is not denied that the four brothers, amongst whom was the plaintiff's husband, had a joint right in the performance of the ceremonies and in the profits thereby accruing to them. The parties frequenting a *ghaut* for the purpose of burning their dead, could not perhaps be obliged to employ a particular *purohit*, but that has nothing to do with the question of the right to enjoy the joint profits accruing from the performance of these ceremonies."

In *Munajoo v. Ram Dyal*,⁷⁴ a suit for a declaration of plaintiff's rights, in virtue of a sale by defendants, to share in the ministrations at a certain *ghaut*, and for the recovery of plaintiffs' share, under that contract of sale, of monies received by the defendants at that *ghaut* was held to lie. This decision was followed in *Chuni v. Birjo*,⁷⁵ in which it was held, that the Courts could take cognizance of a suit "brought for a declaration of the plaintiff's *jajmankee* right in certain *manzahs*, and also for a moiety of certain fees in deposit with a third party, which fees have been earned, as alleged, by the plaintiffs by themselves and the defendants for priestly services," though "the decision will not bind the *jajmans* who will have full liberty to appoint either the plaintiffs or the defendants as their priest." The Allahabad High Court in *Doorga Prasad v. Budree*⁷⁶ held what the Sadar Court had held in 1856, N. S.

D. D. 509. The parties to the suit were *Maha Brahmins*, and members of one family, and disputes having arisen between them as to gifts made to them on account of their services, the matter was referred to arbitrators, who awarded that each principal member of the family should, in turn for periods of 15 days, take the gifts made during such period. The suit was to recover a gift presented to some of the defendants during a period in which, under the terms of the award, he was entitled to the family gains. The High Court held the suit to be cognizable, saying that if the parties had without the intervention of the arbitrators, agreed to such an arrangement as was alleged by the plaintiff, and the plaintiff had desired to enforce it, on no ground could the Court refuse to give effect to the contract; and that the case was not different when the contract was made through the intervention of the arbitrators.

On that same principle, it was held as early as 1859 in *Bkootwa v. Omar Ali*,⁷⁷ that the *kazi* of a Parganah could not recover fees voluntarily paid to another party for the performance of a ceremonial, which he might have been, but was not, called on to perform. In *Ram Kishen v. Doonee Chand*,⁷⁸ the Punjab Chief Court held that where there were two priests in a village, they might make a contract for a division of the fees that either might realise from those of the villagers, who preferred him as their priest, and that the Courts would give effect to any contract they might so make. In *Ram Ruttun v. Gori*,⁷⁹ the Court of First Instance held that *birt* (Fees) paid to the *purohit* was not legally divisible among his relatives, because the office was not hereditary, such fee being merely the right of him who rendered service, of him to whom it was given by the donor." "This," said the Chief Court, "is correct, so far as it expresses the relation between the donor and the donee of the fees, but effect may be given to a contract, or any other relation, really existing between two or more *purohits*, binding them to divide the collections amongst themselves. There is no reason why effect should not be given to such a liability by the Courts." The Court further observed that legally no one but the *purohit*, to whom such fees

⁷⁷ 1859, N. S. D. D. 127.⁷⁸ II P. R. 122.⁷⁹ VII P. R.

were given, had a right to them, "but if circumstances exist arising out of that *purohit's* relation to others, or out of his express or implied promises, or his ancestral or joint family connection with others, which create an obligation to pay over to any one else, a portion of the earnings of such *purohit*, such circumstances may be shown, as may give to rise to a legally enforceable claim." In *Gobind v. Sadda*,⁸⁰ A. and B. were members of a family of *purohits*, and under an arrangement between the ancestors of both, it was settled that A.'s ancestor should receive the fees paid by the *jajmans* during two months of each year. This arrangement was carried out during C's lifetime, and after his death his widow received the dues in his place. On her death certain *jajmans*, erroneously thinking that B. was the heir of C. and that A. had no pretensions to be such an heir, paid their fees to B. during the said months. A son of C's daughter sued B. to recover the amount so paid and it was held unanimously by a Full Bench that the suit would lie; even Fitzpatrick, J., who was distinctly of opinion that the *jajman's* liberty had destroyed all property in the right to the office of a priest, admitting that "the position of an hereditary *purohit*, as carrying with it the good will of an established professional connection, is still valuable, and accordingly it is not uncommon for the heirs of a deceased *purohit* to enter into agreements among themselves as to the seasons in which they will officiate, and as to the manner in which they will share the fees."

The same is the law with regard to rights to secular offices and the fees annexed thereto. In *Poorun Mal v. Khedoo Sahoo*,⁸¹ it was held that payments to Chaudris being voluntary, and those who made them under no legal obligation to render them to any particular individual in preference to another, or to any one at all against their will, the Courts could not give a decree in respect of them. The same was held in *Bhinuk v. Collector of Jounpur*,⁸² in which case the plaintiff had been in the habit of receiving certain fees as a Chaudri from persons using a certain market-place, but the Court said he had no such right to them as could legally be enforced. So a decree having the effect of establishing in regard to voluntary payments,

an exclusive right in plaintiffs, of an indefinite description, to be exercised within limits practically undefined, will not be granted. This was held in *Ram Deehul v. Chukho*,⁸³ which was a suit for the establishment of the plaintiffs' rights to the office of Chaudri of boats, and for the maintenance of their possession of that office with which the defendant interfered; and the charge against the defendant, was not that he had received any dues or fees to which the plaintiffs were lawfully entitled, but that he had obstructed them from making the collections. The payments made to plaintiffs were, however, held to be of a voluntary nature, and those making them under no legal obligation to make them to plaintiffs in preference to other persons. In the Bombay Presidency in *Yellapa v. Mankia*,⁸⁴ the plaintiff alleged that he was entitled to a two annas share in the *Mahar's watan* in a certain village, and as such entitled to share in all the customary perquisites (the carcasses of dead cattle) and that the defendants had obstructed him in the enjoyment of his share of such proceeds; and the suit being to recover those proceeds or their value was held to lie. But a suit was held not to lie against barbers to compel them to shave plaintiff,⁸⁵ or to *pare his nails*.⁸⁶

118. The law with regard to questions relating to caste has, though proceeding on other analogies, been somewhat the same in at least Western and Southern India. In the Bengal Presidency, suits for restoration to caste and relating to the validity or invalidity of marriages were made cognizable by Civil Courts by Bengal Regulation III of 1793, and in 1847 a suit for restoration to caste was held to lie without any contention to the contrary.⁸⁷ In 1848 a similar suit was held to lie even among Muhammadans. In 1859 a suit was held to lie for a declaration of the plaintiff's right to be admitted to the membership of a *dal* or society.⁸⁸ In *Sudharam v. Sudharam*,⁸⁹ a suit for a declaration of the plaintiff's right to the membership of a *samaj* was held not to lie, but only on the ground that in the circumstances alleged, he had no such right as he desired to have enforced. "It is not

⁸³ IALL 201.⁸⁴ VIII B. P. C. R. 11 C 17... P. 4
R 351

Sonaram v. Obharam, A

Sel. Rep. 144

Ram Nath v. Ram Lohani,

Bong. 535

III B. L. R. 11 C 91.

112, S. P. A

S. P. A. R

contended," said Markby, J., in delivering his judgment in the case, "that the membership of the society involved in it directly or indirectly, any right of property whatever, but that it only laid certain social disadvantages on the plaintiff not to be a member of that society. Nor is it contended that the plaintiff has been excluded from any house, or any room, or the enjoyment of any right of any kind whatever, except the bare right of membership of a society. . . . It is therefore quite clear to me that there is no right of property whatever involved in this suit, but only a question as to whether or not the plaintiff was entitled to continue a member of the society which partakes of a character partly social and partly religious. I have no doubt whatever that the Court has no jurisdiction to entertain a suit of this kind. It appears to me that the exclusion of questions of this kind from the Courts of Law rests upon principles common to English and Hindu law. Both the English law and the Hindu law appear to me to draw a clear distinction between interference for the protection of rights of property and of personal liberty, security, and reputation and interference in matters of a purely social nature. Even where rights of property are involved in the membership of Society or Association, yet if the main object of the Association be of a social character, the members of the Association are the sole judges whether a particular individual has so conducted himself as to entitle him to continue to be a member of the body. This was so held in the case of *Hopkinson v. Marquis of Exeter*.⁹⁰ There a member of a club sued for his restoration to the membership of that club, from which he had been, as he thought, unjustly excluded. The club in that case was partly of a political character, but its objects were mainly social, and the Court refused to interfere with the decision of the other members who had excluded the plaintiff, notwithstanding that rights of property were involved. Much less should we interfere here where there are no such rights."

In the Bombay Presidency, however, Sec. 21 of Regulation II of 1827 in giving the Civil Courts a cognizance "generally of all suits and complaints of a civil nature," expressly provided, "that no interference on the part of the Court in caste questions is hereby warranted beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the

plaintiff arising from some illegal act or unjustifiable conduct of the other party." It was accordingly held by the Sadar Court there in *Hurruck Chand v. Khoshal Chand*,⁹¹ that the members of a caste had power to exclude any one of their number, except from malicious motives; but that a malicious refusal to invite a member to a solemn feast to which the other members of the caste were invited was a sufficient cause of action for a suit for damages for loss of character,⁹² as exclusion from such entertainments was a very marked way of showing that the person excluded was an outcaste. In *Mayashankar v. Harihshankar*,⁹³ the suit was for damages for the injury to the plaintiff's character and reputation caused by the defendant's omission to send a certain funeral present to the plaintiff as a member of the caste, and Sir Charles Sargent, C. J., and Birdwood, J., held that the suit would not lie, as "there could be no legal right to the funeral presents, which it was said to be customary for a member of the caste on the occasion of the death of a member of his family to give to the other members of the caste." "And as to the slight, which the omission to give such presents to the plaintiff might imply," said Sir Charles Sargent, C. J., in delivering the judgment of the Court:—"It can only be regarded as the result of a breach of social etiquette, with which the caste was exclusively competent to deal." The same view was taken in *Raghunath v. Janardhan*,⁹⁴ in which Mr. Justice Farran, referring to a number of cases,⁹⁵ said that—the right to the invitation to the quasi-religious ceremonies of the caste was not a legal right, but only a social privilege, that the caste was the only tribunal to which a man deprived of that privilege could resort, and that the Civil Courts could not compel the members of any caste to ask any one to any ceremonies, and mulct the caste or any member of it, in damages for not inviting him; that if the majority of the caste was against any one, "he and his supporters must bow to the decision, or secede from the caste. This Court has no power to assist him. It is a caste question unconnected with property or legal rights. The Courts in the Mofussil are prohibited by legislation from interfering in such questions. This Court has always felt itself bound by that regulation,⁹⁶ or rather by the principle which underlies it."

⁹¹ Borr. 38.

⁹² *Mann v. Hari Ram*, 1 Borr. 84.

⁹³ I. L. R. X Bom. 661.

⁹⁴ I. L. R. XV Bom. 599.

⁹⁵ *Joy Chunder, v. Ranichurn*, VI W. R. 335.

Sudharani v. Sudharani, III B. L. R., A. C., 91.

Shankara v. Hanma, I. L. R. II Bom. 470.

⁹⁶ Bom. No. 11 of 1827.

But the scope of the Regulation is not so extensive as might be, and actually has sometimes been, supposed to be. It does not apply to communities like those of Beni-Israel as they are not castes.⁹⁷ It was, no doubt, held in *Nemchand v. Savaichand*,⁹⁸ in 1866 by a Full Bench that a suit by certain members of a caste to recover, as such members, a portion of certain money payable to the caste by a Collector as compensation for certain property of the caste did not lie in the Civil Courts; and the decision was followed in *Girdhar v. Kalya*,⁹⁹ in which certain persons who seceded from the caste sued to recover a portion of certain utensils that continued in the possession of persons who had charge of them before. But West, J., in delivering the judgment of the Court in *Pragji Kalan v. Govind Gopal*,¹⁰⁰ said:—"The section does not say that a Civil Court is not to take cognizance of any case in which a question of a caste rule or of membership of a caste may be raised by way of answer to a claim for property or on a breach of contract. . . . It is plain that the Civil Courts may discuss and deal even with a caste question where the membership and the character of a member have been unjustly injured. To take evidence of the customary law of a caste, to recognize the law and the vote of a majority as given effect to by the law, is not to interfere in caste questions; it is simply to recognize the existence of castes as corporations with civil rights and an autonomy suitable to the purposes of their existence.¹ The cases under the English law of clubs and congregations afford useful analogies; and besides *Brown v. Curé of Montreal*,² we may refer to *Hopkinson v. Marquis of Exeter*,³ *Dawkins v. Antrobus*,⁴ *Gompertz v. Goldingham*.⁵ The Court in dealing with such cases does not interfere in club questions so as to impair the autonomy of the club, but it would not allow one member or six to take possession of all the club plate on a mere assertion that they had as good a right to it as any one else. In the present case, it is alleged that certain members of a division of a caste borrowed vessels for use from the priest of that division, and then seceding to the other division refused to return them. If the statement is true, the borrowers could not escape liability under their contract of loan, merely because an incidental question of the relations of the divisions and of the members

The Advocate General of Bombay v. David Haim, I. L. R. XI Bom. 185.

⁹⁷ I. L. R. V Bom. 84 (n).

⁹⁸ I. L. R. V Bom. 83.

I. L. R. XI Bom. 535.

¹ *Murari v. Suba*, I. L. R. VI Bom. 725.

² I. R. 6 P. O. 167.

³ I. R. 5 E.

⁴ I. R. 17 Oh. Div. 615.

⁵ I. L. R. IX Mad. 319.

under the terms of incorporation might arise for decision. As castes are capable of property, they are entitled to protection in its enjoyment, and they may be represented by a group of their members, as in this case.” And in *Mehta Jethalal v. Jamiatram*,⁶ Sir Charles Sargent, in delivering the judgment of the Court, said :—“If the lands in dispute had been originally the property of the caste, the question would have been between the caste and a section of it, and would be, as decided in *Nemchand v. Savaichand*, a caste question, and, therefore, not cognizable by the Civil Courts; but here the lands had been admittedly purchased by the members who had seceded (and since become reunited with the majority), and constituted the small section, out of their own funds and for their own purposes; and the question to whom those lands now belong, cannot be a caste question, unless indeed the small section itself could be regarded, as a separate and distinct caste. Under these circumstances it is for the Civil Court alone to determine who is now entitled to the property in dispute, although it may be incidentally necessary for that purpose to inquire into the usage and practice, (if there be any), of caste sections, situated as the small section of this caste was, with respect to the property in question.”

119. Suits relating to marriage have always been held to be of a Civil nature even when they do not involve any claim to property.⁷ In the case of *Ardaseer Cursetjee v. Perozeboye*,⁸ Dr. Lushington in delivering the judgment of their Lordships of the Privy Council expressed an opinion in favor of the exercise of jurisdiction over such suits by Civil Courts. Even among Mahomedans, such a suit was brought with success as early as 1832 in Bengal Sudder Dewani Adalat.⁹ There are reports of other cases in which such suits were held to lie without any contention against the jurisdiction of the Civil Courts.¹⁰ An argument against their jurisdiction was urged before their Lordships of the Privy Council in *Buzloor Ruheem v. Shumsoonnissa Begam*,¹¹ on the ground, that such a suit being founded on the contract of marriage which the Mahomedan law regards as a Civil contract, the

⁶ I. L. R. XII Bom. 235.

⁷ *Nandlal Dass v. Tapidas*, 1 Bom. 14.

⁸ VI M. L. A. 390.

⁹ *Abdul Wahab v. M. Hingu*, 5 Beng. S. D. A. Rep. 200.

¹⁰ *Ameena v. Kutto Khan*, VII Beng. S. D. A. Rep. 27.

¹¹ XI M. L. A. 551.

Court entertaining the suit must be prepared to enforce all the obligations however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them, “and that these obligations were such that it was impossible for Courts constituted like those of British India to exercise such a jurisdiction.” Their Lordships over-ruled this contention, observing that—“the Canonists lay down many things concerning the relative [duties of man and wife, which the Courts Christian, at least of our country, feel compelled to leave as duties of imperfect obligation. They do not, therefore, refuse to enforce the broad duty of cohabitation. In the words of Lord Stowel, ‘They are content to take the wife to the husband’s door and to leave her there’” Their Lordships in their decision in favor of the jurisdiction concluded that “upon authority, as well as principle, their Lordships have no doubt that the Mussulman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation.” Since that decision such suits are allowed to lie without any contention against their cognizance by Civil Courts on general principles,¹² and even non-payment of exigible dower is not held to bar their cognizance.¹³ That decision has been held to conclude the question of the jurisdiction of Civil Courts over such suits among Hindus also,¹⁴ among whom such suits are frequently held to lie without any serious contention to the contrary.¹⁵ The contrary was held by Markby and L. S. Jackson, JJ., in *Ramsaran v. Rakhal Das*,¹⁶ and by Glover, J., in *Aunjona Dasi v. Prahlad Chandra*.¹⁷ But in the latter case, Mitter, J., whose decision was restored on appeal, observed that there was no reason for holding that the Civil Courts of this country were not competent to entertain a suit of that description merely because no question of property was involved in it, that the institution of marriage was, even among Hindus, not only a religious sacrament, but also a civil contract, and important civil rights arose from it quite independant of any right of property, that rights of property were not the only civil rights recognized by law, and that if there were other sorts of civil rights besides those of property, the Civil Courts were bound to

¹² *Gidan v. Mazar Hussein*, I. L. R. I All. 488.

Kunhi v. Mohidin, I. L. R. XI Mad. 327.

¹³ *Abdul Kadir v. Salima*, I. L. R. VIII All. 149.
Hamidunnissa v. Zohiruddin, I. L. R. XVII Cal. 670.

¹⁴ *Kateeram v. Gendhenee*, XXII W. R. 176.
Yamunabai v. Narayan, I. L. R. I Bom. 164.

Jogendro Nundina v. Hurry Doss, I. L. R. V. Cal. 500.

Brindaban Chandra v. Chandra Kurmoker,
I. L. R. XII Cal. 140.
VI B. L. R. 244 (n).
VI B. L. R. 243.

protect them, notwithstanding that no question of property was involved therein. "I think," said the Acting Chief Justice on appeal, "that the Court must have jurisdiction such suit to declare the marriage void if procured by fraud or force, or celebrated without the concurrence of the necessary parties, or without the formalities necessary to render it a binding marriage according to Hindu law." In *Paigi v. Sheonarain*,¹⁸ Straight, J., in delivering the judgment of the Court said—that unless it could be held, that the plaintiff by being excluded from caste, on account of having lived and eaten with a Muhammadan woman, "had extinguished his ordinary civil rights as a husband to require his wife to live with him, or that, in other words, the marriage had, under the Hindu law, thereby been dissolved, he is entitled to come into Court to seek the relief he asks." In *Dadaji Bhikaji v. Rukhmabai*,¹⁹ Pinhey, J., held that a suit for the consummation of marriage would not lie, and that under the Hindu Law such a suit would not be cognizable by Civil Courts. This decision was, however, reversed on appeal,^{19a} and Sir Charles Sargent after referring to some of the above cases, and to the unreported cases of *Bapalal v. Bai Amrat*,²⁰ and *Motiram v. Bai Mancha*,²¹ said that they "can leave no doubt that the jurisdiction is well-established, and we therefore entirely agree with the remarks of Mr. Justice Melvill in the last case, that so long as that jurisdiction is not taken away by legislation our Courts have no discretion in the matter."

120. The most important restrictions in the jurisdiction of the ordinary Civil Courts over civil suits are made by the Acts relating to the revenue of the agricultural and other lands assessed with the Government demand. The provisions of these Acts are different for different Provinces, but they all appear to be based on the principle that matters likely to affect the liability for, or the amount of, the Government land-revenue should be adjudicated upon by Revenue Officers who have better acquaintance with such matters, and with a procedure more elastic and summary than that of the ordinary Civil Courts. Thus Sec. 241 of the North-Western Provinces Land Revenue Act (XIX. of 1873) provides, that "no Civil Courts shall

¹⁸ I. L. R. VIII All. 78.
¹⁹ I. L. R. IX Bom. 539.
^{19a} I. L. R. X Bom. 301.

²⁰ 1875 Bom. P. J. 247.
²¹ 1876 Bom. P. J. 129.

exercise jurisdiction over any of the matters specified in that section,' and that all such matters will be within the cognizance of Revenue authorities only.

So also Sec. 93 of the North-Western Provinces Rent Act (XII of 1881) provides that no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in that section^k

j The matters specified in Sec. 241 are :—

- (a) Claims by any person to any of the offices mentioned in Secs. 24 and 33, or to any emolument appertaining to such office, or in respect of any injury caused by his exclusion therefrom ;
- (b) the claim of any person to be settled with, or the validity of any engagement with Government for the payment of revenue, or the amount of revenue, cess or rate to be assessed on any *mahal* or share of a *mahal*, under this or any other Act for the time being in force ;
- (c) any claims connected with, or arising out of, any process enforced on account of neglect or refusal to accept the assessment or terms of sub-settlement proposed by the Settlement-Officer ;
- (d) the formation of the record of rights, the preparation, signing or attestation of any of the documents contained therein, or the notification of Settlement ;
- (e) the determination of the class of a tenant or the rent payable by him, or the period for which such rent is fixed under this Act ;
- (f) the distribution of the land or allotment of the revenue of a *mahal* by partition ; or the determination of the rent to be paid by a co-sharer for land held by him after the partition in the *mahal* of another co-sharer ;
- (g) any matters provided for in Secs. 53 to 61 (both inclusive) relating to the settlement of Land Revenue with any of the persons having any interest in land ;
- (h) any matters provided for in Secs. 79 to 89, both inclusive, and Sec. 103 relating to resumption of rent-free grants ;
- (i) claims connected with, or arising out of, the collection of revenue (other than claims under Sec. 189), or any process enforced on account of an arrear of revenue, or on account of any sum which is by this or any other Act realizable as revenue ;
- (j) claims to set aside a sale for arrear of revenue, other than claims under Sec. 181 ;
- (k) any matter falling within the jurisdiction of the Court of Wards, or on which the jurisdiction of that Court is actively exercised, except for the purpose of recovering property committed by that Court to the charge of the Collector of the District.

k The matters specified in Sec. 93 are :—

- (a) suits for arrears of rent, or, where rent is payable in kind, for the money equivalent of rent, on account of land or on account of any rights of pasturage, forest-rights, fisheries or the like ;
- (b) suits to eject a tenant for any act or omission detrimental to the land in his occupation or inconsistent with the purpose for which the land was let ;
- (c) suits to cancel a lease for the breach of any condition binding on the tenant, and which by law, custom or special agreement, involves the forfeiture of the lease ;
- (cc) suits for compensation for, or to prohibit, any act, omission or breach mentioned in clause (b) or clause (c) ;
- (d) suits for the recovery of any over-payment of rent, or for compensation under Sec. 48 or 49 ;
- (e) suits for compensation for withholding receipt for rent paid ;
- (f) suits for contesting the exercise of the powers of distress conferred on landholders and others by the said Act, or anything purporting to be done in the exercise of the said powers, or for compensation for wrongful acts or omissions of a distrainer ;

might be brought; and that such suits shall be heard and determined in the said Courts of Revenue in the manner provided in the said Act, and not otherwise; but that an appeal shall lie to the District Judge from the decision of the Collector of the District or Assistant Collector of the first class in all the cases in which the amount or value of the subject-matter exceeds one hundred rupees, or in which the rent payable by the tenant has been a matter in issue, and has been determined, or in which the proprietary title to land has been determined between parties making conflicting claims thereto: and that, where the amount or value of the subject-matter of the suit exceeds five thousand Rupees, the appeal shall lie to the High Court. Sec. 95 of the same Act further provides that no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any application of the nature mentioned in that section might be made; and such applications shall be heard and determined in the said Courts in manner provided in the said Act, and not otherwise.¹ The case law connected with these Provincial Acts is very heavy, questions connected with the various clauses

suits by *lambardars* for arrears of Government-revenue, payable through them by the co-sharers whom they represent, and for village expenses and other dues for which the co-sharers may be responsible to the *lambardar*;

- (h) suits by recorded co-sharers for their recorded share of the profits of a *mahal*, or any part thereof, after payment of the Government-revenue and village-expenses, or for a settlement of accounts;
 - (i) suits by *Muâffidars*, or assignees of the Government-revenue, for arrears of revenue due to them as such;
 - (j) suits by *taluqdars* and other superior proprietors for arrears of revenue due to them as such;
 - (k) suits by recorded co-sharers to recover from a recorded co-sharer who defaults arrears of revenue paid by them on his account.
- 1 The applications mentioned in Sec. 95 are :—
- (a) application to determine the nature and class of a tenant's tenure, under Sec. 10;
 - (b) application by a landholder, or his agent, to compel a *patuvari* to produce his accounts relating to land;
 - (c) application to resume rent-free grants under Sec. 30, or to assess to rent land previously held rent-free;
 - (d) application from a landholder to eject a tenant under Sec. 35, or to have a notice of ejectment issued and served under Sec. 38;
 - (e) applications made by a tenant under Sec. 39;
 - (f) application from a landholder, under Sec. 40, for assistance to eject a tenant;
 - (g) application from a tenant or landholder to determine the value of any standing crop, or ungathered products of the earth, belonging to the tenant and being on the land at the time of his ejectment, under Sec. 42;
 - application by a landholder to determine rent payable for land used by a tenant for the purpose of tending or gathering in the crop, under Sec. 42;
 - (i) application by a landholder or tenant for assistance in the division or appraisement of a standing crop, under Sec. 43;
 - (j) application by a landholder or tenant to determine compensation for improvements of land;

and sub-clauses coming often before the Allahabad High Court for settlement. The High Court held, for instance, in *Tota Ram v. Har Kishan*,²² that a Settlement Officer had no jurisdiction to settle the question as to whether the defendants were not lessees, but mainly inferior proprietors, or to settle about any right. In *Mahesh Rai v. Chandar Rai*,²³ a Full Bench of the same High Court held that, a suit by a landlord for a declaration as to certain land being his *sir-land* against a tenant in occupation thereof would not lie in the Civil Courts; because the only object of having such a declaration would be to get the Court in a roundabout way to say that the defendant was not an occupancy-tenant of the landlord.

So also Sec. 158 of the Punjab Land Revenue Act XVII of 1887 enacts that, except as otherwise provided by the said Act, a Civil Court shall not have jurisdiction in any matter which the Local Government or a Revenue Officer is empowered by the said Act to dispose of, or take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under the said Act; and in particular over any of the matters specified in that section."

application by a tenant for leave to deposit rent ;

- (l) application for enhancement or determination of rent ;
- (m) application for compensation for wrongful dispossession ;
- (n) application for the recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed ;
- (o) application for abatement of rent ;
- (p) application for leases or counterparts, and for the determination of the rates of rent at which such leases or counterparts are to be delivered ;
- (q) application under Sec. 7 to have the holding of an ex-proprietary tenant divided off ;
- (r) application under Sec. 22A to survey land ;
- (s) application under Sec. 33A to have a notice of relinquishment declared invalid ;
- (t) application to take out of deposit any amount deposited under Sec. 55A.

m The matters specified in Sec. 158 are :—

- (i) Any question as to the limits of any land which has been defined by a Revenue-Officer as land to which the said Act does or does not apply ;
- (ii) any claim to compel the performance of any duties imposed by the said Act or any other enactment for the time being in force on any Revenue-Officer, as such ;
- (iii) any claim to the office of kanungo, zaildar, inamdar, or village-officer, or in respect of any injury caused by exclusion from such office, or to compel the performance of the duties or a division of the emoluments thereof ;
- (iv) any notification directing the making or revision of a record-of-rights ;
- (v) the framing of a record-of-right or annual record, or the preparation, signing, or attestation of any of the documents included in such a record ;
- (vi) the correction of any entry in a record-of-rights, annual record, or register of mutations ;

Similarly Sec. 76 of the Punjab Tenancy Act XVI of 1887 enacts that the applications and the proceedings mentioned in that section * shall be disposed of by Revenue Officers as

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- (vii) any notification of the undertaking of the general re-assessment of a district or tahsil having been sanctioned by the Governor-General in Council ;
 - (viii) the claim of any person to be liable for an assessment of land-revenue or of any other revenue assessed under the Act ;
 - (ix) the amount of land-revenue to be assessed on any estate or to be paid in respect of any holding under the Act ;
 - (x) the amount of, or the liability of any person to pay any other revenue to be assessed under the Act, or any cess, charge, or rate to be assessed on an estate or holding under the Act or any other enactment for the time being in force ;
 - (xi) any claim relating to the allowance to be received by a landowner who has given notice of his refusal to be liable for an assessment, or any claim connected with, or arising out of, any proceedings taken in consequence of the refusal of any person to be liable for an assessment under this Act ;
 - (xii) the formation of an estate out of waste-land ;
 - (xiii) any claim to hold free of revenue any land, mills, fisheries, or natural products of land or water ;
 - (xiv) any claim connected with, or arising out of, the collection by the Government, or the enforcement by the Government of any process for the recovery of land-revenue or any sum recoverable as an arrear of land-revenue ;
 - (xv) any claim to set aside, on any ground other than fraud, a sale for the recovery of an arrear of land-revenue, or any sum recoverable as an arrear of land-revenue ;
 - (xvi) the amount of, or the liability of any person to pay, any fees, fines, costs, or other charges imposed under the Act ;
 - (xvii) any claim for partition of an estate, holding, or tenancy, or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought ;
 - (xviii) any question as to the allotment of land on the partition of an estate, holding, or tenancy, or as to the distribution of land subject by established custom to periodical re-distribution, or as to the distribution of land-revenue on the partition of an estate or holding or on a periodical re-distribution of land, or as to the distribution of rent on the partition of a tenancy ;
 - (xix) any claim to set aside or disturb a division or appraisement of produce confirmed or varied by a Revenue-Officer under the Act ;
 - (xx) any question relating to the preparation of a list of village-cesses or the imposition by the Local Government of conditions on the collection of such cesses ;
 - (xxi) any proceeding under the Act for the commutation of the dues of a superior landowner ;
 - (xxii) any claim arising out of the enforcement of an agreement to render public service in lieu of paying land-revenue ; or
 - (xxiii) any claim arising out of the liability of an assignee of land-revenue to pay a share of the cost of collecting or re-assessing such revenue, or arising out of the liability of an assignee to pay out of assigned land-revenue, or of a person who would be liable for land-revenue if it had not been released, compounded for, or redeemed to pay on the land-revenue for which he would, but for such release, composition, or redemption, be liable, such a percentage for the remuneration of a zaildar, inamdar, or village-officer as may be prescribed by rules for the time being in force under the Act.

* The applications and proceedings specified in Sec. 76 are :—

- (a) Proceedings under Sec. 27 for the adjustment of rents expressed in terms of the land-revenue ;
- (b) proceedings relating to the remission and suspension of rent under Sec. 30 ;

such, and no Court shall take cognizance of any dispute or matter with respect to which any such application or proceeding may be made or had: and in determining whether a dispute or matter is such, it is the real relief claimed in the suit, and not its mere form or any relief that may be asked for only incidentally, that is taken into consideration. Thus a suit for possession of land on the ground that plaintiff is entitled to hold it as a tenant with a right of occupancy has been held in *Nihal Singh v. Kaman*,²⁴ to be not a suit to establish a claim to a right of occupancy, and therefore cognizable by Civil Courts. Mr. Justice Roe, in delivering the judgment of the Full Bench, said:—"It is true that in these cases it is essential to the obtaining the relief asked for, that plaintiff should establish 'his claim to a right of occupancy,' but it appears to us that this question of title is only raised incidentally. The cause of action alleged by plaintiff is a being wrongfully deprived of, or kept out of the cultivating possession of certain lands, and the relief he asks for is a restoration to such possession. This is a relief which the Civil Courts alone

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- (c) applications under Sec. 43 for the ejectment of a tenant against whom a decree for an arrear of rent in respect of his tenancy has been passed and remains unsatisfied;
 - (d) applications under Sec. 45, sub-sec. (5), for the ejectment of a tenant on whom a notice of ejectment has been served, and who has not instituted a suit to contest his liability to be ejected, but has claimed compensation under Sec. 71;
 - (e) applications under Sec. 53 or Sec. 54 for the fixing of the value of a right of occupancy;
 - (f) applications under Sec. 35 or Sec. 54 by landlords for possession of land the right of occupancy in which has become extinct;
 - (g) proceedings under Chapter VI with respect to the award of compensation for improvements or disturbance;
 - (h) applications under Sec. 17 with respect to the division or appraisement of produce;
 - (i) applications under Sec. 45, sub-sec. (5), for the ejectment of a tenant on whom a notice of ejectment has been served, and who has not instituted a suit to contest his liability to be ejected, and has not claimed compensation under Sec. 71;
 - (j) applications for the determination—
 - (i) under Sec. 49 of the rent payable for land occupied by crops uncut or un-gathered at the time of an order being made for the ejectment of a tenant, or
 - (ii) under Sec. 49 or Sec. 74 of the value of such crops or of the sum payable to the tenant for labour and capital expended by him in preparing land for sowing;
 - (k) applications under Sec. 31 by tenants to deposit rent;
 - (l) applications under Sec. 36 for service of notice of relinquishment;
 - (m) applications under Sec. 43 for service of notice of ejectment;
 - (n) applications under Sec. 53 or Sec. 54 for service of notice of intended transfer or of intended foreclosure or other enforcement of lien.

can give him." In *Kesar Singh v. Nihal Singh*,²⁵ Rivaz, J., in delivering the judgment of the Full Bench, said:—"For the purposes of the Act (XVI of 1887), a tenant who has been dispossessed can, for the period of one year from the date of his dispossession, claim to be still regarded as a tenant, *quoad* his landlord, his suit for recovery of possession being cognizable by the Revenue Court. If he allows the period of one year to lapse without making any claim, he must be taken (subject to any recognized disability) to have relinquished his right to be still regarded as a tenant, and his remedy (if such still exists) must be sought in the Civil and not in the Revenue Court."

The Bombay Revenue Jurisdiction Act X of 1876, provides "that no Civil Court shall exercise jurisdiction as to any of the matters specified in Sec. 4 of the Act," but that nothing

o The matters specified in Sec. 4 are :—

(a) claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III. 1874 or any other law for the time being in force, or of any other village-officer or servant, or

claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service, or

suits to set aside or avoid any order under the same Act or any other law relating to the same subject for the time being in force passed by Government or any officer duly authorized in that behalf, or

claims against Government relating to lands held under treaty, or to lands granted or held as saranjam, or on other political tenures, or to lands declared by Government or any officer duly authorized in that behalf to be held for service;

(b) objections—

to the amount or incidence of any assessment of land-revenue authorized by Government, or to the mode of assessment, or to the principle on which such assessment is fixed, or to the validity or effect of the notification of Survey or Settlement, or of any notification determining the period of Settlement;

(c) claims connected with, or arising out of, any proceedings for the realization of land-revenue, or the rendering of assistance by Government or any officer duly authorized in that behalf to superior holders or occupants for the recovery of their dues from inferior holders or tenants;

claims to set aside, on account of irregularity, mistake, or any other ground, except fraud, sales for arrears of land-revenue;

(d) claims against Government—

to be entered in the Revenue Survey or Settlement Records or village papers as liable for the land-revenue, or as superior holder, inferior holder, occupant or tenant, or

(2) to have any entry made in any record of a Revenue Survey or Settlement, or

(3) to have any such entry either omitted or amended;

(e) the distribution of land or allotment of land-revenue on partition of any estate under Bombay Act IV of 1868, or any other law for the time being in force;

shall be held to prevent Civil Courts from entertaining suits mentioned in Sec. 5 of the Act, or any suits other than suits against Government, for possession of any land, being a whole survey number or a recognized share of a survey number." In the Madras Presidency and the Lower Bengal, the jurisdiction of the Civil Courts in such cases has not, as a general rule, been excluded, but there are partial restrictions of their jurisdiction there also. The Act for Recovery of arrears of Revenue in the Madras Presidency thus provides,—“that no Court of civil jurisdiction shall have authority to take into consideration or decide any question as to rate of land-revenue payable to Government, or as to the amount of assessment fixed, or to be hereafter fixed, on the portions of a divided estate.”²⁶

121. The Revenue Courts thus adjudicating on questions of a civil nature are for the purposes of the rule of *res judicata* treated as Civil Courts, at least when their procedure is regulated by provisions of, or similar to those contained in, the Civil Procedure Code ; and their decisions on questions within their

Applicability of the doctrine of *res judicata* to decisions of Revenue Courts.

- (f) claims against Government—
to hold land wholly or partially free from payment of land-revenue, or to receive payments charged on or payable out of the land-revenue, or to set aside any cess or rate authorized by Government under the provisions of any law for the time being in force, or respecting the occupation of waste or vacant land belonging to Government ;
 - (g) claims regarding boundaries fixed under Bombay Act No. I of 1865, or any other law for the time being in force, or to set aside any order passed by a competent officer under any such law with regard to boundary-marks ;
- except when any person claims to hold land wholly or partially exempt from payment of land-revenue under—
- (h) any enactment for the time being in force expressly creating an exemption not before existing in favor of an individual or of any class of persons, or expressly confirming such exemption on the ground of its being shown on a public record or of its having existed for a specified term of years ; or
 - (i) an instrument or sanad given by, or by order of, the Governor of Bombay in Council, under Bombay Act No. II of 1863, Sec. 1, cl. 1, or Bombay Act No. VII of 1863, Sec. 2, cl. 1, or
 - (j) any other written grant by the British Government expressly creating or confirming such exemption, or
 - (k) a judgment by a Court of Law, or an adjudication duly passed by a competent officer, under Bombay Regulation XVII of 1827, Chapter X, or under Act XI of 1852, which declares the particular property in dispute to be exempt.

Suits mentioned in Sec. 5 are :—

- (a) suits against Government to contest the amount claimed, or paid under protest or recovered, as land-revenue on the ground that such amount is in excess of the amount authorized in that behalf by Government, or that such amount had, previous to such claim, payment, or recovery, been satisfied, in whole or in part, or that the plaintiff, or the person whom he represents, is not the person liable for such amount ;
- (b) suits between private parties for the purpose of establishing any private right, although it may be affected by any entry in any record of a Revenue Survey or Settlement or in any village papers ;
- (c) suits between superior holders or occupants, and inferior holders or tenants regarding the dues claimed or recovered from the latter.

jurisdiction, constitute *res judicata* in regard to the same matters even in the ordinary Civil Courts. The Allahabad High Court thus held in *Amir Singh v. Naimati Prasad*,²⁷ that a decision by an Assistant Commissioner or a Revenue Court as to the rights of the parties in regard to the *quantum* of the common land to which they were entitled, would be *res judicata* in a subsequent suit in a Civil Court on the basis of the same right. So also the Calcutta High Court observed in *Merjah Janand v. Krishto Chunder*,²⁸ that the decision of a Collector under Sec. 38 of the Bengal Rent Act (VIII of 1869) would be conclusive between the parties in any subsequent suit for rent. The same High Court in *Gokhul Sahu v. Jodu Nundun Roy*,²⁹ further held that a Revenue Officer had power to adjudicate on the question that certain land was *mal* land and liable to pay rent, and therefore his decision would be *res judicata* as regards that point in a subsequent suit in a Civil Court. Pigot and Beverley, J.J., in their decision, referring to *Hurri Sunkur v. Muktaram*,³⁰ said —“ That decision was based on the principle that the decision of a Revenue Court on a question of title is no bar to the trial of the same question by the ordinary Civil Courts. But by Sec. 107 of the Bengal Tenancy Act, the Revenue Officer is directed to adopt the procedure laid down in the Code of Civil Procedure for the trial of suits, and it is provided that his decision in every such proceeding shall have the force of a decree. It appears to us that these words were intended to invest him for the trial of these disputes with the powers of a Civil Court. . . . The language of the Act is unfortunately vague; but we cannot suppose that it was the intention of the Legislature after providing for the trial of disputes regarding entries in the record of rights by the Code of Civil Procedure and by a special Appellate Court, that such disputes should be liable to be re-opened before the ordinary Civil Courts of the country.” The Madras High Court has taken a more restricted view of the effect of the judgments of Revenue Courts. In *Harika Ramayyar v. Tirtasami*,³¹ the Court held that a suit by a tenant for a declaration of the rate at which he was entitled to receive a patta for 1289 F., was not barred by a prior suit by the landlord to enforce the acceptance of a patta for 1288. Sir Charles Turner, C.J., and Kernan, J., further said : “ Nor can we hold that a Revenue Court in this Presidency in suits for enforcing the acceptance of *pattas* has, under the Rent

I L.R., IX All., 388.
 I.L.B., X Cal., 507.
 I.L.B., XVIII Cal., 721.

30 XV. B.L.B., 238.
 31 I.L.R., VII

Act, power to determine title otherwise than incidentally to the limited jurisdiction conferred on it. Consequently it cannot be held the matter now in issue, *viz*, whether the tenant has by special contract, a right to hold at privileged rights, has been finally decided in that suit." In *Ragava v. Rajagopal*,³² the High Court observed that a Revenue Court having ordered a tenant to be ejected under Sec. 10 of the Rent Recovery Act on the ground that he had refused to accept a *patta* as directed by the Court; it was held that a suit would not lie in the Civil Court to set aside that order. In *Venkatachalapati v. Krishna*,³³ the Madras High Court held that a Revenue Court had power to determine the question of title, and its decision as to the defendant's liability to accept as tenant a *patta* of certain land from plaintiff as its owner, in a suit by plaintiff to enforce acceptance of the *patta* for one year, would be *res judicata* as to the defendant's status of a tenant in a subsequent suit in that same Court by the same plaintiff to enforce acceptance of a *patta* for another year. It was argued in that case, that the decision of a Revenue Court could not operate as *res judicata* in a subsequent suit between the parties, inasmuch as it had reference only to the year for which the suit was brought, and a Revenue Court could decide a question of title only incidentally; and reference was made in support of this argument to *Harika Ramayyar v. Tirtasami*, *Chunder Coomar v. Nunnee Khanum*,³⁴ *Debi Prasad v. Jafar Ali*,³⁵ and *Boistub Churn v. Trahee Ram*,³⁶ but Sir Arthur Collins, C. J., and Wilkinson, J., said:—"None of these cases are in point. In these cases it was held that the decision of a Revenue Court is no bar to a suit brought in the regular Courts. We have not been referred to any case in which it has been held that the doctrine of *res judicata* is not applicable to the Revenue Courts." Since then the High Court has held in *Oliver v. Markanda*,³⁷ and in *Gungaraju v. Kondireddi*,³⁸ that a decision of a Revenue Court is not binding on a Civil Court, Muttusami Ayyar and Best, J.J., having in the latter case expressed their approval of the principle laid down in *Harika Ramayar v. Tirtasami*, and their dissent from that laid down in *Ragava v. Rajagopal*.

122. The Small Cause Courts in the Presidency towns and in the Mofussil are also Civil Courts of a peculiar class having a rather limited jurisdiction of an ex-

³² I.L.R., IX Mad., 39.

³³ LL.R., XIII Mad., 287.

³⁴ XI B. L. R., 434.

³⁵ I. L. R., III All., 40.

³⁶ XV W. R., 32.

³⁷ III. M. L. J., 263.

³⁸ I. L. R., XVII Mad., 106.

clusive character over certain classes of suits for money or movable property, which may be tried summarily, and which on that ground are excluded from the jurisdiction of the ordinary Civil Courts. The Provincial Small Cause Courts Act (IX of 1887) thus specifies in the schedule^p annexed thereto the classes of suits cognizable by

^p The classes of suits specified in the schedule are :—

- (1) A suit concerning an act or order purporting to be done or made by the Governor-General in Council or a Local Government, or by the Governor-General or a Governor, or by a Member of the Council of the Governor-General or of the Governor of Madras or Bombay in his official capacity, or concerning an act purporting to be done by any person by order of the Governor-General in Council or a Local Government ;
- (2) a suit concerning an act purporting to be done by any person in pursuance of a judgment or order of a Court or of a judicial officer acting in the execution of his office ;
- (3) a suit concerning an act or order purporting to be done or made by any other officer of the Government in his official capacity, or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office ;
- (4) a suit for the possession of immovable property, or for the recovery of an interest in such property ;
- (5) a suit for the partition of immovable property ;
- (6) a suit by a mortgagee of immovable property for the foreclosure of the mortgage or for the sale of the property, or by a mortgagor of immovable property for the redemption of the mortgage ;
- (7) a suit for the assessment, enhancement, abatement, or apportionment of the rent of immovable property ;
- (8) a suit for the recovery of rent, other than house-rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto ;
- (9) a suit concerning the liability of land to be assessed to land-revenue ;
- (10) a suit to restrain waste ;
- (11) a suit for the determination or enforcement of any other right to or interest in immovable property ;
- (12) a suit for the possession of an hereditary office or of an interest in such an office, including a suit to establish an exclusive or periodically recurring right to discharge the functions of an office ;
- (13) a suit to enforce payment of the allowance or fees respectively called *malikana* and *huk*, or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution ;
- (14) a suit to recover from a person to whom compensation has been paid under the Land Acquisition Act, 1870, the whole or any part of the compensation ;
- (15) a suit for the specific performance or rescission of a contract ;
- (16) a suit for the rectification or cancellation of an instrument ;
- (17) a suit to obtain an injunction ;
- (18) a suit relating to a trust, including a suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust, and a suit by a co-trustee to enforce against the estate of a deceased trustee a claim for contribution ;
- (19) a suit for a declaratory decree, not being a suit instituted under Sec. 283 or Sec. 332 of the Code of Civil Procedure ;
- (20) a suit instituted under Sec. 283 or Sec. 332 of the Code of Civil Procedure ;
- (21) a suit to set aside an attachment by a Court or a revenue-authority, or a sale, mortgage, lease, or other transfer by a Court or a revenue-authority or by a guardian ;
- (22) a suit for property which the plaintiff has conveyed while insane ;
- (23) a suit to alter or set aside a decision, decree, or order of a Court or of a person acting in a judicial capacity ;
- (24) a suit to contest an award ;
- (25) a suit upon a foreign judgment as defined in the Code of Civil Procedure or upon a judgment obtained in British India ;
- (26) a suit to compel a refund or assets improperly distributed under Section 295 the Code of Civil Procedure ;

the ordinary Civil Courts, and lays down that the Courts of Small Causes in the Mofussil will take cognizance of all other suits, of which the value does not exceed Rs. 500 (and in case of a special order by the Local Government, Rs. 1,000), and that the ordinary Civil Courts shall not take cognizance of

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- (27) a suit under the Indian Succession Act, 1865, Sec. 320 or Sec. 321, or under the Probate and Administration Act, 1881, Sec. 139 or Sec. 140, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets;
 - (28) a suit for a legacy or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate;
 - (29) a suit—
 - (a) for a dissolution of partnership or for the winding-up of the business of a partnership after its dissolution;
 - (b) for an account of partnership-transactions; or
 - (c) for a balance of partnership-account, unless the balance has been struck by the parties or their agents;
 - (30) a suit for an account of property and for its due administration under decree;
 - (31) any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant;
 - (32) a suit for a general average loss or for salvage;
 - (33) a suit for compensation in respect of collision between ships;
 - (34) a suit on a policy of insurance or for the recovery of any premium paid under any such policy;
 - (35) a suit for compensation—
 - (a) for loss occasioned by the death of a person caused by actionable wrong;
 - (b) for wrongful arrest, restraint, or confinement;
 - (c) for malicious prosecution;
 - (d) for libel;
 - (e) for slander;
 - (f) for adultery or seduction;
 - (g) for breach of contract of betrothal or promise of marriage;
 - (h) for inducing a person to break a contract made with the plaintiff;
 - (i) for obstruction of an easement or diversion of a watercourse;
 - (j) for illegal, improper, or excessive distress or attachment;
 - (k) for improper arrest under Chapter XXXIV. of the Code of Civil Procedure, or in respect of the issue of an injunction wrongfully obtained under Chapter XXXV. of that Code; or
 - (l) for injury to the person in any case not specified in the foregoing sub-clauses of this clause;
 - (36) a suit by a Muhammadan for exigible (*mu'ajjal*) or deferred (*muwajjal*) dower;
 - (37) a suit for the restitution of conjugal rights, for the recovery of a wife, for the custody of a minor, or for a divorce;
 - (38) a suit relating to maintenance;
 - (39) a suit for arrears of land-revenue, village-expenses, or other sums payable to the representative of a village-community or to his heir or other successor in title;
 - (40) a suit for profits payable by the representative of a village-community or by his heir or other successor in title after payment of land-revenue, village-expenses, and other sums;
 - (41) a suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or by a manager of joint property, or a member of an undivided family, in respect of a payment made by him on account of the property or family;
 - (42) a suit by one of several joint mortgagors of immovable property for contribution in respect of money paid by him for the redemption of the mortgaged property;
 - (43) a suit against the Government to recover money paid under protest in satisfaction of a claim made by a revenue-authority on account of an arrear of land-revenue or of a demand recoverable as an arrear of land-revenue;
 - (44) a suit the cognizance whereof by a Court of Small Causes is barred by any enactment for the time being in force.

the suits so cognizable by the Small Cause Courts. If a certain suit triable by a Small Cause Court is dismissed for default, and on account of a change of law ceases to be so, and is after that, again taken on the file; it will continue to be cognizable by a Small Cause Court, as till restored the suit was only in suspense.⁵⁶ A suit to enforce payment by defendant of money received by him as dues from a third person, and claimed by plaintiff to be dues payable to himself, is cognizable by a Small Cause Court,⁵⁷ Plowden, J., in delivering the Court's judgment in the case cited, observing as to Art. 13 of Schedule II of the Small Causes Courts Act, 1887, that—"the Art. as it stands, must be limited to suits against the person by whom the dues are payable, or his legal representatives, and cannot be extended to suits to recover dues which have been paid from the person to whom they have been wrongfully paid." A suit on the judgment of a Foreign Court does not lie in a Small Cause Court.⁵⁸ In the earlier case cited, Plowden, J., said—"We are unable to agree with the view expressed by Mr. Justice Melvill, in I. L. R. VI Bom. 292,⁵⁹ that a suit on a foreign judgment is, 'a claim for money due on contract.' If it be admitted, that—'when a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum,' it does not, in our opinion, follow that a suit to enforce the obligation involves a claim for money due on contract." A suit for malicious prosecution claiming damages in vakeels' fees and stoppages of business is a claim for compensation, and therefore not cognizable by a Small Cause Court. In *Wazir Singh v. Ganga Ram*,⁶⁰ Powell, J., in delivering the Court's judgment, said—"Under the new Act, the more general term compensation seems expressly intended to include all claims whether for money as a payment for actual loss in trade or other loss caused." A suit for a declaration that certain property released from attachment on a claim by a third person is liable as judgment-debtor's to attachment and sale in execution of a decree held by plaintiff, or in the alternative for its value, is not cognizable by a Small Cause Court. Where a claim to the attached property is disallowed and the property sold in execution, and a suit brought for it or its value, the suit will be cognizable by a Small Cause Court.⁶¹ In *The Maharaja of*

⁵⁶ *Sant Ram v. Nihala*, 1880 P. R. No. 53.

⁵⁷ *Harnam v. Gadu*, 1880 P. R. No. 81.

⁵⁸ *Kanhya Lal v. Alla Ditta*, 1888 P. R. No. 97.

Ude Ram v. Dayan, 1880 P. R. No. 37.

⁵⁹ *Bhavanishankar v. Purnadri*.

⁶⁰ 1880 P. R. No. 30.

⁶¹ *Sultan Mahomed v. Kanshi Ram*, 1886 P. R. No. 91.

Masta v. Radhakisen, 1880 P. R. No. 5.

Kashmir v. Fatteh Din,¹² Rattigan, J., in delivering the Judgment of the Court, said—"We do not think the mere existence of an agreement, if the suit is one for rent, would give the Small Cause Court jurisdiction, which it would not otherwise possess. Rent is ordinarily payable under an agreement, and had the Legislature intended to allow the jurisdiction of Small Cause Courts to be affected by such a circumstance, we should have expected it to have indicated its meaning by adding a proviso under Art. 8 of the second Schedule to that effect.

123. Similarly on the ground of the importance or complexity of enquiries in certain suits and proceedings, the jurisdiction in their case is restricted to the higher grades of Civil Courts. Thus Sec. 539 of the Civil Procedure Code provides that a suit of the sort mentioned in that section, and relating to the administration of the trust property, can be instituted only in a High Court or District Court, within the local limits of whose jurisdiction the whole or any part of the property may be situate. In fact, miscellaneous proceedings unconnected with suits are cognizable in the Presidency towns by the High Courts, and outside thereof generally by the District Judge, who is usually the Judge of the principal Civil Court of Original Jurisdiction. In some cases the Subordinate Judge or some other Judicial Officer is empowered to dispose of them on a reference thereof to him by the District Judge having jurisdiction. Thus Sec. 26 of the Succession Certificates Act, 1889, provides that the Local Government may invest any Court inferior in grade to a District Court, with the functions of a District Court under the Act, and that every Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Court in the exercise of all the powers conferred by the Act upon the District Court. So also Bengal, North-Western Provinces and Assam Civil Courts Act provides¹³ that—"the High Court may, by general or special order, authorize any Subordinate Judge or Munsif to take cognizance of, or any District Judge to transfer to a Subordinate Judge or Munsif under his administrative control, any of the—

(a) proceedings under Bengal Regulation V, 1799 (to limit the interference of the Zillah and City Courts

¹² 1898 P. R. No. 164.

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¹³ Act No. XII of 1887.

of Dewany Adawlut in the execution of wills and administration to the estates of persons dying intestate);

- (d) proceedings under the Indian Succession Act, 1865, and the Probate and Administration Act, 1881, which cannot be disposed of by District Delegates; and
- (e) references by Collectors under Sec. 322C. of the Code of Civil Procedure.

In Punjab, the Division Court is the District Court for all districts comprised in the Division for the purposes of the Indian Divorce Act, and may be declared to be so by the Local Government for any other purposes.¹⁴

The question of jurisdiction in Miscellaneous proceedings is for the purposes of *res judicata* of particular importance in cases in which a judgment *in rem* can be passed and mention of which will be made in chapter VIII. Here a reference may be made only to the jurisdiction in such cases. The Presidency High Courts have under their respective Charters full jurisdiction “in relation to the granting of probates of last wills and testaments and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying whether within or without the Presidency; as well as in matters matrimonial between British subjects professing the Christian religion.” Similar powers are vested in and exercised by the North-Western Provinces High Court, and the highest Courts in other provinces invested with the functions of the High Courts; the probates and letters of administration granted by the High Courts or by the Chief Court of the Punjab or by the Recorder of Rangoon, having effect throughout the whole of British India. The Indian Succession Act, 1865, and the Probate and Administration Act, 1881, also provide, in general words that—“the District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district;”¹⁵ though the probates and letters of administration granted by them have effect only in the Province in which the Court granting them is situate. District Courts also have jurisdiction in matrimonial matters over Christians even under the Indian Divorce Act, 1869, the

¹⁴ Sec. 23, Act XVIII of 1884.

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¹⁵ *Vide* Sec. 235, Act X of 1865, 51, Act V of 1881.

'Native Converts' Marriage Dissolution Act, 1866, and The Indian Christian Marriage Act, 1872. Admiralty jurisdiction is vested in the High Courts by Letters Patent under which they have been established, and to a limited extent in other Courts, under Secs. 12 and 13 Vict. c. 96, and 23 and 24 Vict. c. 88. Similarly the Insolvency Jurisdiction of the High Courts, is derived from 11 and 12 Vict. c. 21, and their respective Letters Patent. Such insolvency jurisdiction, as can be exercised by the Mofussil Courts, is regulated by Chapter XX of the Code of Civil Procedure, Act XIV of 1882, under which all applications are to be made to the District Court; though it may transfer any of them to any other Court invested by the Local Government with the powers of a District Court; a Court so invested having jurisdiction to entertain an application only when made by any person who has been arrested or imprisoned, or against whose property an order of attachment has been made, in execution of a decree for money passed by that Court.⁴⁶

124. It is a peculiarity of the judicial system of British India, that throughout the country there are Courts of different grades having jurisdiction in suits of different amounts, in certain prescribed local areas; and this peculiarity, as pointed out by Sir Barnes Peacock in *Edun v. Bechun*,⁴⁷ is of particular importance in the application of the doctrine of *res judicata*. In determining whether any Court has jurisdiction over any particular suit, regard, therefore, must be had not only to the nature of the suit, but also to the pecuniary extent of the Court's jurisdiction. Elaborate rules are laid down for the determination of that jurisdiction in the various Acts under which the Courts are constituted or by which their procedure is prescribed and regulated; and the case-law relating to the valuation of claims is also very heavy. The pecuniary limitations of the jurisdiction of different grades of Civil Courts present great variations in the several Provinces. As a general rule, the jurisdiction of a District Judge or Subordinate Judge (and in the so-called non-Regulation Provinces, of a Deputy Commissioner) extends to all original suits. In the Territories administered by the Lieutenant-Governors of Bengal and of the North-Western Provinces and by the Chief Commissioner of Assam⁴⁸ (except Jhansi Division and the other parts not subject to the ordinary Civil Jurisdiction of the High Courts⁴⁹), the

⁴⁶ Sec. 360, Act XIV of 1882.
⁴⁷ VIII W. R. 175.

⁴⁸ Sec. 18, Act XII of 1867.
⁴⁹ Sec. 1, Act XII of 1867.

jurisdiction of a Munsif extends to all the suits of which the value does not exceed one thousand rupees or (if specially authorized by the Local Government) two thousand rupees.⁵⁰ Similarly in the Madras Presidency the jurisdiction of a District Munsif extends to all civil suits and proceedings, of which the amount or value of the subject-matter does not exceed two thousand five hundred rupees.⁵¹ In the Bombay Presidency the corresponding officers are designated Subordinate Judges of the second class, and their jurisdiction extends to all original suits and proceedings of a civil nature wherein the subject-matter does not exceed in amount or value five thousand rupees,⁵² an Assistant Judge being competent to try all suits of which the subject-matter does not amount to ten thousand rupees in amount or value and such miscellaneous applications, not being of the nature of appeals, as are referred to him by the District Judge to whom he is subordinate.⁵³ In Oude, the jurisdiction of a Subordinate Judge extends to ten thousand rupees, and the jurisdiction of a Munsif to five hundred rupees, and if specially empowered by the Local Government to one thousand rupees. In the Punjab, Act XVIII of 1884 leaves the pecuniary limits of the jurisdiction of a Subordinate Judge and a Munsif to be determined by the Local Government and the Chief Court respectively as they may think fit, provided only that in the case of the latter the jurisdiction shall not extend to suits the value of which exceeds one thousand rupees.

125. The Civil Procedure Code appears to prescribe a minimum pecuniary limit of the jurisdiction of the Civil Courts. Sec. 15 of the Code lays down that every suit shall be instituted in the Court of the lowest grade competent to try it, and the same was enacted by Sec. 6 of the Civil Procedure Code of 1859. Sec. 12 of the Madras Civil Courts Act expressly provides that the jurisdiction of a District Judge or a Subordinate Judge extends to all original suits and proceedings of a civil nature, *subject to the rules* contained in the Code of Civil Procedure. Sec. 18 of the Bengal, North-Western Provinces, and Assam Civil Courts Act, 1887, still more specifically, like Sec. 19 of the Civil Court Act, 1871, provides that—"the jurisdiction of a District Judge or Subordinate Judge extends,

⁵⁰ Sec. 19, Act XII of 1857.
⁵¹ Sec. 12, Act III of 1873.

⁵² Sec. 24, Act XIV of 1869.
⁵³ Sec. 16, Act XIV of 1869.

subject to the provisions of Sec. 15, to all original suits." The Calcutta High Court held, in *Russick Chunder v. Ram Lall*,⁵⁴ and in *Sufeeoollah v. Begum Bibee*,⁵⁵ that Sec. 6 of the Code of 1859, even taken with Sec. 19 of the Civil Courts, 1871, was not intended to take away jurisdiction from any Court of a general jurisdiction. With reference to Sec. 15 of the present Code, it has been held by a Full Bench of Allahabad High Court in *Nidhi Lal v. Mazhar Husain*,⁵⁶ that it is merely directory, and does not oust the jurisdiction of the District Judge or Subordinate Judge. Mr. Justice Oldfield said—"that the provision in Sec. 15 is one entirely of procedure as distinct from jurisdiction;" and Mr. Justice Duthoit said—"the decree in a suit cognizable by a Munsif would not, in my judgment, be liable to be reversed in appeal for want of jurisdiction in the Subordinate Judge: for the jurisdiction was there, though it ought not to have been exercised. And this view of the matter is, I think, consistent with the received canon of construction, that unless the Legislature causes negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only." The leading decision in the case was delivered by Mahmood, J., who after referring to Secs. 13 and 15 of Act XVI of 1868 said:—"Sec. 15 says, 'Subordinate Judges are empowered to try all original suits cognizable by the Civil Courts, of which the subject-matter exceeds in amount or value Rs. 1,000, and (if the District Judge shall have referred them under the Code of Civil Procedure) suits of which the subject-matter is of any less amount or value.' These two sections leave no doubt that at the time when Act XVI of 1868 was passed, the Legislature intended that the jurisdiction of the Subordinate Judge should begin where that of the Munsif ceased. . . . This conclusion is supported by the terms of Sec. 16, which says-- 'The Local Government may invest any Subordinate Judge with the powers of a Munsif under Sec. 13, and may define and from time to time vary the local limits within which such powers are to be exercised.' . . . Now it seems to me that in Sec. 19 (Act VI of 1871) the most important word is 'all' in the phrase 'all original suits';

⁵⁴ XXII W. R. 301.⁵⁵ XXV W. R. 219.⁵⁶ I. L. R. VII All. 230.

and reading that section with Sec. 20, it is perfectly clear that the object of the two sections was to create a jurisdiction in a Subordinate Judge concurrent with a Munsif in suits up to Rs. 1,000 in value, but not concurrent in suits of value beyond Rs. 1,000. This was a distinct alteration of the law, and it is important to notice that the rule contained in Sec. 16 of Act XVI of 1868 has not been reproduced in Act VI of 1871. An important part of the argument of the learned pleader for the appellant related to the effect of the words in Sec. 19 of the present Act,—‘*subject to the provisions in the Code of Civil Procedure, Sec. 6.*’ I am of opinion that ‘*competent*’ means ‘having jurisdiction’—that is, with reference to the pecuniary value and nature of the suits which the Court has power to try. The Court *competent*—that is, having jurisdiction—to try the suit may be of more than one grade, because the whole object of the section is to provide that the suit should be instituted in the Court *of the lowest grade*—a phrase which would not have been employed if there were not a higher Court possessing jurisdiction to try the suit; in other words, if the jurisdiction were possessed by only one Court. Now, as to Sec. 25. The section undoubtedly enables the High Court or the District Court to transfer a case of less value than Rs. 1,000 from the Court of a Munsif to that of a Subordinate Judge who would be *competent*—that is, would have jurisdiction—to try the suit. It is not that the Act of transferring a suit confers jurisdiction; but the existence of jurisdiction with reference to the *nature and value* of the suit is a condition precedent to the exercise of the power of transfer. If any other view were to be taken of the section, it would follow that the High Court or the District Court could transfer a suit of higher value than Rs. 1,000, from the Court of a Subordinate Judge to that of a Munsif. This of course cannot be done, and the reason is that the Munsif’s Court is not *competent*—that is, has no jurisdiction—to try suits of higher value than Rs. 1,000. From this reasoning it follows that on the one hand Sec. 15 of the Civil Procedure Code itself contemplates no disturbance of jurisdiction as provided by the Civil Courts Act; and on the other hand, its provisions, both in Sec. 15 and Sec. 25, proceed upon the implied ground that, whilst the Munsif’s Court has no jurisdiction in suits of higher value than Rs. 1,000,

‘the jurisdiction of a District Judge extends. . . . to *all* original suits cognizable by the Civil Courts’. . . . My own view is that Sec. 19 of Act VI of 1871 refers to the Civil Procedure Code merely as a matter of convenience. Sec. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction; and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of any Court of a higher grade. In order to fortify his argument the learned Pandit called our attention to Sec. 57, cl. (a) of the Civil Procedure Code, which lays down that the plaint shall be returned to be presented to the proper Court, ‘if a suit has been instituted in a Court whose grade is lower or higher than that of the Court *competent* to try it, where such Court exists, or where no option as to the selection of a Court is allowed by law.’ The provision is no doubt imperative, but it is merely a matter of procedure, and does not affect the question of jurisdiction. It simply repeats in another form the rule contained in Sec. 15 of the Code. The learned Pandit, however, contends that the language of the clause goes to show that there is only one Court *competent*—that is, which has jurisdiction—to try the suit. The contention, though plausible, has no real force, because, in the first place, the section is not referred to in Sec. 19 of the Civil Courts Act; in the second place, it cannot be read irrespective of Sec. 15 of the Civil Procedure Code, and bearing this in mind, there can be no doubt that the clause is only a rule of procedure and does not affect the question of jurisdiction.’ In *Krishnasami v. Kanakasabai*,⁵⁷ Sir Arthur Collins, C.J., and Shephard, J., also incidentally expressed an opinion in favor of the view that Sec. 15 had merely enacted a rule of procedure and did not oust the jurisdiction of the superior Courts. A similar view has sometimes been taken in England⁵⁸ and the United States⁵⁹ of enactments providing a minimum limit of pecuniary jurisdiction. It is held that in such cases there is no want of power, because the greater always includes the less. The contrary, however, has also been held in some of the States.⁶⁰

⁵⁷ I. L. R., XIV Mad. 183.

⁵⁸ *Prigg v. Adams*, 2 Salk. 674.

⁵⁹ *Emery v. Nelson*, 9 Serg. and R. 12.
Scott v. Moore, 98 Am. Dec. 581.

⁶⁰ *Raymond v. Hinkson*, 15 Mich. 113.
Smith v. Knowlton, 11 N. H. . . .

Cropper v. Com., 2 Rob. 842.

Moore v. Town Council of Edgofield, 32 Rep. 498.

Derby v. Stevens, 64 Cal. 287.

Hyman v. Coleman, 16 Am. St. Rep. 176.

The jurisdiction of a suit is determined by its value as given in the plaint, though, as observed by Sir Richard Couch, C. J., in delivering the judgment of the Calcutta High Court in *Bonomally v. Campbell*,⁶¹ the plaintiff cannot "give jurisdiction, merely by adding to his claim sums which he could not under any circumstances be entitled to recover." In *Lakshman Bhatkar v. Babaji Bhatkar*,⁶² West, J., said—"If a plaintiff by a very natural mistake, estimates the value of what he claims somewhat higher than a third party would do, and thus raises it to a sum which gives the Subordinate Judge, First Class, exclusive jurisdiction, the mere fact that after an investigation, the Court does not award so much as Rs. 5,000 or its value is not at all conclusive that the suit was brought in the wrong Court. This point in another aspect was recently considered by the present Bench, and the conclusion arrived at was that a *bonâ fide* error of this kind did not make a particular mode of procedure based on it illegal. What *primâ facie* determines the jurisdiction is the claim, or subject-matter of the claim, as estimated by the plaintiff, and this determination having given the jurisdiction, the jurisdiction itself continues whatever the event of the suit, unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive. This principle is that the jurisdiction of the Court properly having cognizance of the cause is not to be ousted by unwarrantable additions to the claim. In the case of *Nanda Kumar v. Ishan Chandra*,⁶³ Sir B. Peacock, C. J., says—"The Small Cause Court cannot be ousted of its jurisdiction merely by asking for an alternative relief to which the plaintiff is not entitled," (that the defendant may be ordered to fill up the excavation at once). Neither by analogy ought the Court of minor jurisdiction to be deprived of its cognizance of a cause by the addition of claims which cannot be sustained and which there is no reasonable ground for expecting to sustain. An exaggerated claim thus brought for the purpose of getting a trial in a different Court from the one intended by the Legislature is substantially a fraud upon the law, and must be rejected, whether it arises from mere reck-

⁶¹ X B. L. R., 193⁶² I. L. R., VIII Bom 31⁶³ I B. L. R., A. C. 91.

lessness or from an artful design to get the adjudication of one Judge instead of that of another." In *Mahabir Singh v. Behari Lal*,⁶⁴ Sir John Edge, C. J., and Knox, J., expressed their approval of and concurrence with the rule and its qualification as laid down by the Bombay High Court. That decision was distinguished in *Damodhar v. Trim-bak*,⁶⁵ as having proceeded on Sec. 25 Act XIV of 1869, the language of which differed from that of Sec. 5 of Act XI of 1865, under which latter a Court of Small Causes had jurisdiction in suits, "when the debt, damage, or demand does not exceed in amount or value the sum of five hundred rupees;" and with reference to which the High Court held, that a claim even when 'recklessly over-valued at above Rs. 500, and decreed to the extent of Rs. 441, would not be cognizable by a Court of Small Causes. Both the main rules are recognized and acted upon by the Courts in the United States also. There, the rule has been thus stated by the Texas Supreme Court—"Jurisdiction so far as matter or amount in value is concerned, must be determined by the petition, and the question is concluded by its averments in so far as they relate facts in relation to the thing in controversy, unless it otherwise appears that an attempt has been made to confer jurisdiction by averments improperly and fraudulently made. In actions sounding in damages, the amount of damages claimed, and not the amount of the verdict, determines jurisdiction. In actions *ex contractu*, the amount claimed determines jurisdiction, if it is not made to appear that a fraud upon jurisdiction has been attempted by improper averments in the petition."⁶⁶ In other States also, it has been repeatedly held that if the claim is stated erroneously and fraudulently in order to give jurisdiction to a Court, it should be dismissed by that Court as beyond jurisdiction.⁶⁷ The North Carolina Supreme Court has held the same,⁶⁸ and Mr. Hawes says—"that in North Carolina it is held, that the demand of the amount necessary to give jurisdiction should be made in good faith, and that a verdict for a smaller amount is *prima facie* evidence of an intention to evade the question of jurisdiction."⁶⁹ In *Fix v. Sissung*,⁷⁰ the facts showed that the value alleged in the

⁶⁴ I. L. R., XIII All. 320.

⁶⁵ I. L. R., X Bom. 370.

Dwyer v. Bassett, 63 Tex. 274.

Tidball v. Eichoff, 66 Tex. 58.

Ratigan v. Holloway, 69 Tex.

Griffin v. McDaniel, 63 Miss. 121.

Penn v. Harrington, 54 Miss. 733.

Paul v. Burton, 52 Vt. 155.

Field v. Randall, 51 Vt. 33.

⁶⁸ *Wiseman v. Witherow*, 90 N. C. 140.

Moore v. Nowell, 94 N. C.

⁶⁹ Haw. Jur. 20.

⁷⁰ 21 Am. St. Rep. 616.

declaration was made in bad faith, and was a fraud upon the Court, and the Michigan Supreme Court held that value would not give jurisdiction, Champlin, C. J., observing—"that while values of property depend in a large measure, upon opinion, and this Court, when the value is near the limit, will not declare in all cases a want of jurisdiction, if in good faith the declaration alleges the value within the jurisdiction of the Circuit Court, nevertheless it will not hold that jurisdiction is obtained when the fraud upon the Court is apparent, as it is in this case." In *Rockwell v. Perine*,⁷¹ the claim was for one hundred dollars (the maximum limit of the Court's jurisdiction) and over, and the judgment, which was for sixty dollars only, was held by the New York Supreme Court to be not void, the words 'and over' being said to be 'meaningless as, &c.'

127. If the sum claimed by the plaintiff is within the jurisdiction of a Court, the suit will be cognizable by the Court, even if that sum is due in respect of a bond, the total amount remaining due on account of which is beyond its jurisdiction;⁷² or is due in respect of rent, and the total amount payable under the lease is in excess of the jurisdiction;⁷³ or for damages arising from the resale of goods, though the original contract was for a sum beyond jurisdiction.⁷⁴ In *McVey v. Johnson*,⁷⁵ the Supreme Court of Iowa observed, that—"it is the amount in controversy, and not the items or matters out of which the claim arises, which confers or defeats jurisdiction, and that is to be determined by the sum which may be recovered in the action." It has been repeatedly held that in suits for torts, the jurisdiction is determined by the amount of damages claimed and not by the amount of damages suffered,⁷⁶ and that in a suit on a bond, the amount claimed and not the penalty fixed by the bond will determine jurisdiction.

Nor does it affect the jurisdiction of the Court over a suit for an amount, not exceeding the limit of its juris-

⁷¹ 5 Barb. 371.

⁷² *Sukoo Monee Debba v. Hurree Mohun*, VI W. R. (C. R.) 6.

⁷³ *Narasidavur v. Marana Kunnalan*, II M. H. C. R. 440.

Sarnam v. Sakma, I. L. R. III A. H. 37.

⁷⁴ *Kuppu Chetty v. Chudambara*, III M. H. C. R. 170.

⁷⁵ 75 Iowa, 161.

⁷⁶ *Cooke v. Woodrow*, 5 Cranch, 13.

DeCamp v. Miller, 14 N. J. L. 617.

Lenduff v. Steubenville Co., 14 Ohio, 336.

⁷⁷ *United States v. McDowell*, 4 Cranch, 316.

Brown v. Shannon, 20 How. 55.

Fowler v. McDaniel, 6 Housk. 320.

diction, that the claim is in respect of a debt, which as it originally stood was beyond the jurisdiction of the Court,⁷⁸ or for the balance of an account involving items exceeding that limit. Sir Richard Couch, C. J., said—"the cases of *Woodhams v. Newman*⁷⁹ and *Berwick v. Capper*,⁸⁰ decide that a plaintiff cannot treat a counter-claim of the defendant, as a payment in reduction of the plaintiff's demand, without an assent on the part of the defendant; but if the parties have reduced the amount by payments, or by settling and ascertaining a balance, so as to bring it within the limit, the Court has jurisdiction to try the case." In *Joseph v. Henry*,⁸¹ the defendant's wife having accepted two bills of exchange, amounting together to above £20, the plaintiff as indorsee, levied a plaint in the County Court of S. for the sum of about £5, the balance alleged to be due. The drawer of the bill induced the defendant's wife, in his absence, to deposit with him some articles of jewelry belonging to the defendant which were handed by him to the plaintiff. The plaintiff sold these articles, and treated the proceeds of the sale as part-payment. Upon the hearing of the plaint, the defendant produced evidence to show that his wife had no authority to accept the bills, or to deliver the articles in question to the drawer of the bills, and contended that the plaintiff had, therefore, no right to sell the jewelry, or appropriate the proceeds of the sale as a part payment of the bills; and, therefore, that, as the demand originally exceeded £20, the Judge of the County Court had no jurisdiction. The Judge, however, gave a verdict in favor of the plaintiff for the balance claimed, on the ground that the articles given were in part payment. . . . It was admitted that the County Court had jurisdiction, if the defendant had assented to the goods being appropriated in the way the plaintiff sought to establish, but it was contended that there was no such assent shown, but, on the contrary, the defendant throughout repudiated the right of the plaintiff to do so. Coleridge, J., in giving judgment said,—“The Judge has arrived at a conclusion of fact, if we understand him as stating that he considered the defendant to have conferred the power of sale and appropriation of the proceeds on the plaintiff, which would certainly give him

jurisdiction." In the United States also, it appears to be settled that though the jurisdiction of a Court is limited to a certain sum, and the original indebtedness sued upon exceeds that amount, still, the jurisdiction of the Court is not ousted if the original sum has been reduced below the jurisdictional limits by *bona fide* credits.⁸² The jurisdiction is ousted, however, if the credits are feigned.⁸³ On a similar principle, "the amount of an open account," says Mr. Hawes, "is the amount of the debit-side, but if the account is settled, the balance is the debit-side and determines jurisdiction."

128. When a Court has once acquired jurisdiction of a suit, the nature of evidence produced in support of it, and the amount proved or decreed are not material, and cannot oust that jurisdiction. It was accordingly held in *Sikur Chund v. Sooring Mull*,⁸⁴ that it was the *bona fide* amount of the claim, and not the amount decreed that determined the jurisdiction. In *Hazara Singh v. Lal Singh*,⁸⁵ a suit was instituted in a Court having jurisdiction up to Rs. 500, for redemption of certain mortgaged property, on payment of Rs. 43 or such other sum as the Court may determine, and the Court decreed redemption on payment of Rs. 63. The defendant appealed to the District Judge on the ground that he was entitled to Rs. 681, and the Judge held, that Rs. 136 were payable, but he could not pass a decree for redemption on payment of that amount, as his jurisdiction as an Appellate Court was limited to Rs. 100. Sir Meredyth Plowden, said, in delivering the judgment of the Chief Court on appeal—"that upon the amended plaint, it could not be affirmed that the value of the suit does not exceed Rs. 100, and that the jurisdiction is to be determined with reference to the claim made, and not to the decision upon the claim; and that when once the appeal has been properly instituted in the Divisional Court, it is immaterial that, that Court finds less than Rs. 100 to be due; and the finding does not oust its jurisdiction." This rule is of quite a general application. Thus speaking of the practice of the American Courts, Mr. Hawes says,—"that the criterion of jurisdiction is the amount of the matter in demand, as distinguished

⁸² *Hugonin v. Nicholson*, 1 Scam. 574.
Dillard v. Noel, 2 Ark. 449.
Fowler v. Bishop, 32 Conn. 199.
Peter v. Schlosser, 81 Pa. St. 439.

Perkins v. Rich, 12 Vt. 505.
⁸³ *Todd v. Gates*, 20 W. Va. 464.
⁸⁴ 1 Hyde. 272.
⁸⁵ 1891 P. R. No. 63.

from the amount recovered.⁸⁶ The learned Editors of the American State Reports say ;⁸⁷ “ Generally speaking, it is the amount of the plaintiff’s claim, as shown by his complaint or by the summons, which determines the Court’s jurisdiction. It is almost universally maintained that the amount claimed by the plaintiff in the *ad damnum* clause of his declaration, petition or complaint, or that named in the summons, determines the question of the jurisdiction of a Court to entertain an original proceeding, and not the value of the property involved in the controversy, as established by the evidence at the trial, nor the amount found by the jury or finally recovered. This rule is equally applicable to actions commenced in inferior or superior Courts, at law or in equity, in actions *ex contractu* or *ex delicto*. From the host of authorities in which this doctrine has been sustained, the following may be cited : *Skinner v. Bailey*,⁸⁸ *Peter v. Schlosser* ;⁸⁹ *Scott v. Moore* ;⁹⁰ *Vineyard v. Lynch* ;⁹¹ *Giles v. Spinks* ;⁹² *Ashnelot Bank v. Pearson* ;⁹³ *Inhabitants of Township v. Weir* ;⁹⁴ *Pate v. Shafer* ;⁹⁵ *Guard v. Circle* ;⁹⁶ *Culley v. Laybrook* ;⁹⁷ *Lafferty v. Day* ;⁹⁸ *Cole v. Hayes* ;⁹⁹ *McVey v. Johnson* ;¹⁰⁰ *Cavender v. Ward* ;¹ *Derby v. Stevens* ;² *Pennybecker v. McDougal* ;³ *Solomon v. Reese* ;⁴ *Cilley v. Van Patten* ;⁵ *Miles v. Couchman* ;⁶ *Singleton v. Madison* ;⁷ *Abney, Loue & Co. v. Whitted* ;⁸ *Tyler Cotton Press Co. v. Chevalier* ;⁹ *Block v. Fontenot* ;¹⁰ *Zuberbier v. Morse* ;¹¹ *Little v. State* ;¹² *McQuade v. O’Neil* ;¹³ *Clay v. Barlow* ;¹⁴ *Merrill v. Butler* ;¹⁵ *Stephen v. Eiseman* ;¹⁶ *Fenn v. Harrington*.¹⁷

129. Nor can the nature of the defendant’s plea affect the jurisdiction acquired by a Court over the plaintiff’s claim. In *Gobind Singh v. Kallu*,¹⁸ the suit was for the possession of certain mortgaged land on the ground that the mortgage-

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⁸⁶ Haw. Jur. 20.
⁸⁷ 21 Am. St. Rep. 617
⁸⁸ 7 Conn. 496.
⁸⁹ 81 Pa. St. 439.
⁹⁰ 98 Am. Dec. 581.
⁹¹ 86 Mo. 684.
⁹² 64 Ga. 205.
14 Gray, 521.
⁹⁴ 9 Ind. 224.
⁹⁵ 19 Ind. 173.
⁹⁶ 16 Ind. 401.
⁹⁷ 8 Ind. 285.
⁹⁸ 7 Ark. 258.
⁹⁹ 78 Me. 539.
75 Iowa, 165
28 S. C. 470.
64 Cal. 287

³ 48 Cal. 160.
⁴ 34 Cal. 28.
⁵ 68 Mich. 80.
⁶ 4 J. J. Marsh, 242.
⁷ 1 Bibb, 342.
⁸ 28 La. Ann. 818.
⁹ 56 Ga. 494.
¹⁰ 35 La. Ann. 965.
¹¹ 36 La. Ann. 970.
¹² 75 Tex. 616.
¹³ 15 Gray. 53.
¹⁴ 123 Mass. 378.
¹⁵ 18 Mich. 294.
¹⁶ 54 Miss. 535.
¹⁷ 54 Miss. 733.
¹⁸ L. L. R. II A 774

debt had been satisfied from its profits. The defendants questioned the plaintiff's proprietary title, and Mr. Justice Straight, in delivering the judgment of the High Court, said,—“We do not think that the character or nature of the subject-matter of the plaintiff's claim was thereby altered; it continues in its original shape so far as he is concerned, nor is the complexion of it entirely changed because the defendants put forward certain grounds of defence which, if well-founded, must defeat his right to redeem.” That decision was followed by the same Judges in *Bahadur v. Nawab Jan*,¹⁹ the claim in which was based on similar facts. In *Chandu v. Kombi*,²⁰ the suit was for the possession of certain land, valued so as to be within the District Munsif's jurisdiction, and the defendant pleaded that he held a mortgage for Rs. 3,000 over the land, and contended that therefore the Munsif's Court had no jurisdiction, but the Madras High Court over-ruled the contention, and said—“If a plaintiff was bound to value the subject-matter according to the amount specified in mortgages produced by the defendant, whether he admitted them or not, the result would be to give the defendant the selection of the Court in which the suit should be brought, if he chose to set up unfounded claims on invalid *kanams*.” In *Bhag Mal v. Mhora*,²¹ Plowden, J., in delivering the judgment of a Divisional Bench of the Panjab Chief Court said:—“Plaintiff sued for redemption of mortgage of certain land, alleging the amount of the mortgage-debt to be Rs. 300. The defendant pleaded that the mortgage-debt was Rs. 3,000—. . . . We are of opinion that the value of the suit is not altered by the plea of the defendant, whether that plea be true or false—. . . . The question whether the debt is more than Rs. 300 is only indirectly in issue in the suit. The value of the suit is only Rs. 300. The decree for redemption on payment of Rs. 300 involves only indirectly and not directly a question respecting property exceeding Rs. 500 in value. . . . The circumstance that a Court may, in some cases, permit a plaintiff to redeem a mortgage on payment of a sum larger than he alleged in his plaint, and in accordance with the contention of the defendant, does not affect the question, which is merely one of valuation.” This decision

as well as the decision in *Jag Lal v. Har Narian*²² was followed in *Ranje Khan v. Birbal*,²³ in which Burney and Tremlett, J.J., held—"that the valuation of the suit by plaintiff must govern the case. The plaintiff has asked to redeem the land of Rs. 2,300 only, and has neither offered to pay for any excess sum, nor asked for any alternative remedy; so that in no possible way can it be said, that he has as yet valued the suit at any sum over Rs. 2,300. The fact that defendant has stated that a sum over Rs. 5,000 is due to him, and that the Court has found it in defendant's favour makes no difference. . . . The mistake of the Divisional Court seems to arise with regard to the question submitted to his jurisdiction, which question was not the amount of the mortgage-charge as he thought, but only the question as to what the plaintiff was entitled to redeem on Rs. 2,300." In *Rajo v. Dasu*,²⁴ it was contended that the defendant might plead that he was owner of the property, and this would put the whole value of the property in issue; but Plowden, J., in delivering the judgment of the Full Bench of the Chief Court said—"We think this circumstance does not affect the jurisdiction of the Court. A suit must be valued in the first instance, at least, upon the plaint, before any answer by the defendant, and when in the plaint in a redemption suit, the amount alleged to be due on the mortgage is stated, that amount is *prima facie* the value of the suit. Possibly it may turn out that the amount due on the mortgage is understated, but this would hardly be a fatal variation, and provided the mortgage was found to be proved, and the amount found to be actually due did not exceed the pecuniary limit of the jurisdiction of the Court, a decree for redemption might properly be made. A plea in such a suit that the defendant was the owner of the property would only be relevant so far as it imported that there was no mortgage. Even if the ownership was properly put in issue and decided, this would only be done incidentally, and there is no limit to the value of matters which a Court may try incidentally."

In *Jit Singh v. Mutu Shah*,²⁵ the value of a suit in which a set-off is claimed was held to be the value of the suit as instituted by plaintiff, and not that value plus the amount

claimed for set-off. Even an equitable claim of set-off to which Sec. 111 of the Civil Procedure Code does not apply will not be taken cognizance of by a Court, if it is in excess of its pecuniary jurisdiction, though that circumstance will not affect the jurisdiction of the Court over the suit itself.²⁶ Mr. Hawes, in his Work on Jurisdiction says²⁷—"Plaintiff brought suit to recover one hundred and eighty-five dollars, defendant filed an off-set, plaintiff filed an off-set of twenty-five dollars to defendant's off-set, held, the latter claim should not be added to the original claim of plaintiff, thus making an amount exceeding two hundred dollars, the limit of jurisdiction of the Justice's Court."

130. The Madras High Court appears to have held in some of the earlier cases, that if in a suit for rent the defendant *bonâ fide* raise a question of title, the Small Cause Court having jurisdiction of the suit will lose the jurisdiction;²⁸ but a Full Bench of that High Court held in *Alagirisami v. Innasi*,²⁹ that the Munsif conceived that as there was a *bonâ fide*

a raising a question of title to immovable property does not effect the jurisdiction of Small Cause Courts in suits for damages to the property.

question of title as to part of the land included in the *patta*, the Small Cause Court had no jurisdiction over that part of the suit, but it was quite competent to the Small Cause Court to decide the point of title incidentally. Within a month of the above decision, the same question came again before the Full Bench of the High Court in *Manappa Mudali v. McCarthy*,³⁰ and it was held that a plea negating the plaintiff's title does not oust the jurisdiction of a Small Cause Court over a suit for damages. Sir Charles Turner, C. J., said—"In the English Statute 9 and 10, Vic. 95, Sec. 58, it is expressly declared that the Courts established under that Act shall not take cognizance of any action, &c., in which the title to any corporeal or incorporeal hereditaments, &c., shall be in question. There is no similar provision in Act XI of 1865, and I find nothing to warrant me in holding that, where a suit is brought in a form in which it is cognizable by a Small Cause Court,

²⁶ *Brojendra Nath v. Budge Budge Jute Mill Co.*, I. L. R., XX Cal. 527.

²⁷ *Haw. Jur.* 50.

²⁸ *Subbiramaniya v. Velayuda Devan*, I. M. H. C. R., 313.

Amma! v. Subbu Vadiyar, II. M.

H. C. R., 184.

v. Thunna Naikan, V. M.

H. C. R., 64.

²⁹ I. L. R., III Mad. 127.

³⁰ I. L. R., III Mad. 102.

the Court can decline jurisdiction if it appears that incidentally a question of title is raised which it has not jurisdiction to determine for any other purpose than the decision of the suit before it. Notwithstanding such a question of title may be raised by the answer of the defendant, the suit was originally and continues to be of the nature cognizable by a Court of Small Causes." In *Bapuji v. Kuvarji*,³¹ Parsons, J., in delivering the judgment of the Bombay High Court said,—“The Judges of the Court of Small Causes have declined jurisdiction on the ground that the defendant has raised a *bonâ fide* plea of title, which ousts their jurisdiction, the defence set up being that no rent has been paid for the land since 1846, and that the claim is barred by time. Such a plea is, in effect, a denial that the plaintiff has now any *fazendari* rights over the land, and, hence, the present right of the plaintiff to the land as *fazendar* is brought into question and has to be determined. We are of opinion, however, that the importation of this question into the suit has in no way changed the nature of the suit, or converted it from a suit for rent, which is cognizable by the Court of Small Causes, into one for the determination of a right or interest in immovable property, of which its cognizance is barred by Sec. 19 of Act XV of 1882. Two cases decided by a Full Bench of the High Court of Madras,³² when Act XI of 1865 was in force, may be referred to, as Sec. 19 of Act XV of 1882 adopts the language of those cases and not that of the English Statute 9 and 10 Vict., c. 95, Sec. 58, therein quoted. . . .

To the same effect are the decisions of Melvill and Kembell, J.J., in Special Appeal No. 303 of 1871, decided on the 15th September, 1871, and of Sargent and Melvill, J.J., in Special Appeal No. 14 of 1872, decided on the 13th August, 1872. There are numerous rulings to the effect that the nature of a suit is not changed because a question of title is incidentally raised in it. (See, for instance, *Balwant v. Bhikaji*;³³ *Babaji v. Dinkar*;³⁴ *Trikam v. Narayanrar*;³⁵ *Narayan Ramchandra v. Parashram Moreshear*;³⁶ *Khandu v. Tatia*;³⁷ and *Mohesh Mahto v. Shaik Piru*³⁸).

³¹ I. L. R., XV Bom. 403.

³² I. L. R. III Mad. 127.

I. L. R. III Mad. 192.

³³ 1873 Bom. P. J. No. 86.

³⁴ 1873 Bom. P. J. No. 91.

³⁵ 1874 Bom. P. J. 43.

³⁶ 1878 Bom. P. J. 44.

³⁷ VIII. Bom. H. C. R. A. C. 23.

³⁸ I. L. R. II. Cal.

These decisions demand especial notice, as they must have been within the knowledge of Legislature when both Act XV of 1882 and Act IX of 1887 were passed; and yet, in describing the suits which are excluded from the cognizance of Courts of Small Causes, whether in the Presidency-towns or in the Provinces, the Legislature has avoided the use of such words as are found in 9 and 10 Vict. c. 95, Sec. 58, namely,—‘action in which the title shall be in question,’ and has, instead, in both Acts, used the words ‘suit for the determination of any right to or interest in immovable property.’ Such a description can, in our opinion, refer only to suits brought expressly for the purpose of obtaining a decree determining a right or interest in immovable property, and cannot include a suit brought for movable property or money in which a question of title may be raised by the defendant. It is to be noted that Act XV of 1882 contains no such provision as is contained in Act IX of 1887, Sec. 23 of which empowers the Provincial Court of Small Causes to return plaints in suits in which questions of title are involved. The cases of *Nowla Ooma v. Bala Dharmaji*,⁵⁹ and *Davidas v. Tyabally*,⁶⁰ are not at all in point, for there the suits were brought under a particular section of the Act and not under the Act generally. The cases of *Jamnadas v. Bai Shivkor*,⁶¹ and *Kali Das v. Vallabhdas*,⁶² may also perhaps be distinguished, as they were decided on the ground that the sole object of the plaintiff was to try a question of title, and not to obtain a remedy which a Court of Small Causes might properly grant, and in which a title to immovable property only incidentally arose for decision. It may be doubted whether these decisions did not go too far when they allowed a Court to ignore the form of a suit and examine into the motive or object of the plaintiff in bringing it. But, however that may be, since they were decided, the law has been settled by the passing of Act XV of 1882; and we must be guided by its provisions. We must look to the nature of the suit, as brought by the plaintiff, and not to the nature of the defence, to determine whether or not the Court of Small Causes has jurisdiction. It would be obviously wrong to hold, that it is in the power of a defendant to oust the Court of a jurisdiction that it

⁵⁹ L. L. R. II Bom. 91
⁶⁰ L. L. R. X Bom. 701

⁶¹ L. L. R. V Bom.
⁶² L. L. R. VI Bom.

would otherwise have by the mere raising of a plea of title. The *bond fides* of the plea cannot affect the question, for such a plea, whether made *bond fide* or not, would have to be enquired into. Where such a plea is raised, we think that the Court of Small Causes has the power to enquire into it and determine it for the purpose of the suit which it has jurisdiction to try."

131. It is not easy always to determine what is the subject-matter of a suit. It may be premised that the subject-matter of a suit is not necessarily identical with the property to which the suit relates. Thus West, J., in delivering the judgment of the Bombay High Court in *Lakshman v. Babaji*,⁴⁵ said—"It is manifest that what is sought is the true measure of the subject-matter, not what the suit is about in a wider and vague sense." In *Harnam Singh v. Kirpa Ram*,⁴⁶ Plowden, J., (with whom Burney, J., concurred) in making a reference to the Full Bench of the Punjab Chief Court said,—“We are of opinion that, speaking generally, the subject-matter of a suit comprises the particular matters advanced by the plaintiff for the determination of the Court for the purpose of obtaining relief, and also the relief prayed for expressly or by implication. We do not think that either the relief alone, apart from such particular matters, or such matters alone, apart from the relief sought, can be held to be the subject-matter for the purpose of valuation. Still less in our opinion can the subject-matter be held to be the corporeal thing to which the suit relates in the case of suits relating to such things. The reasons for this view are briefly these:—In every suit the plaintiff must disclose some ground for resorting to the Court for aid, and must also claim some relief as being legally due to him, if the particular ground advanced be established. In every suit therefore the plaintiff advances two matters for the determination of the suit, namely, whether such ground exists, and whether, if it does, the relief claimed is due. It seems to us impossible to hold that either of these matters alone is the ‘subject-matter of the suit,’ to the exclusion of the other, since each alike is matter necessary to be determined in the suit

before a decree can be granted to the plaintiff. Further, we think that in suits relating to corporeal things, the corporeal thing to which it relates is not necessarily the subject-matter of the suit for the purpose of determining the value, because it seems undeniable that there may be many different suits all relating to the same corporeal thing, which may obviously be of different value." Barkley, J., in delivering the judgment of the Full Bench on the reference, said,—“We think it clear that the value of a suit for the purposes of jurisdiction under the Punjab Courts Act, 1884, with reference to the definition of ‘value’ contained in Sec. 3 of that Act, is not necessarily identical with the value of the property to which the suit relates, when it relates to any property. As to a suit for partition, it has been expressly decided in IV Calcutta Law Reports, 417,⁴⁵ that the value of the subject-matter is not determined by the market-value of the property, and in another suit between the same parties reported in Indian Law Reports, V Calcutta, 188,⁴⁶ it was held, that in a suit for joint possession of part of an undivided joint property, of which one of the sharers had taken exclusive possession, the value of the subject-matter might well exceed the market-value of the particular land in question. In a suit for compensation for wrong to immovable property, the subject-matter would clearly be not the property, but the damages claimed, and in a suit for the determination of any right to or interest in immovable property falling under class (d), because not belonging to any of the preceding classes, the subject-matter would depend on the nature of the right or interest claimed.” This decision was followed in *Harnam Singh v. Bhagwan Deri*.⁴⁷ In a suit for the cancellation of a bond, the amount of the bond is the subject-matter, and the amount of the interest due on the bond-money in accordance with the terms of the bond at the time of the institution of the suit is not to be taken into account in determining the jurisdiction over the suit.⁴⁸ In *Kali Charan v. Ajudhia Rai*,⁴⁹ the obligor of a bond for the payment of Rs. 6,000 with interest at 4 per cent, per mensem, sued for its cancellation on the ground that he had executed it under the impression that it was only

⁴⁵ *Rajendro Lall v. Shama Churn*.
⁴⁶ *Rajendro Lall v. Shama Churn*.
 1890 P. R. No. 60.

⁴⁷ *Gulab Rai v. Mangli Lal*, I. L. R. VI All. 71.
⁴⁸ I. L. R. II All. 145.

for the payment of Rs. 3,000 with interest at $1\frac{1}{2}$ per cent, per mensem, and the Allahabad High Court held that, the subject-matter of the suit was the difference between Rs. 3,000 and Rs. 6,000 or thereabouts. In *Jogal Kishor v. Tale Singh*,⁵⁰ the suit was on the part of some joint proprietors against other joint proprietors and lessees holding under them, substantially to have the lease declared invalid, and to eject the lessees from the land and to have the valuable buildings erected by them removed, and a Full Bench of the Allahabad High Court held that, the value of the buildings asked to be demolished was not to be taken into account in estimating the value of the suit for the purposes of jurisdiction. So also in a suit for pre-emption, the subject-matter of the suit is not the land or the amount decreed, but the value of the land *minus* the amount decreed.⁵¹ In a suit for the closing of a door, the value of the subject-matter is the difference in the selling price of the plaintiff's premises before and after the door was opened.⁵² In a suit for the removal of certain dams erected by the defendants, the value of the subject-matter must be the depreciation caused to the plaintiff's lands by the interference with their free right to the water of the hill-torrent used for watering those lands, for it is that which the plaintiffs complain of, and which they seek to have remedied by the removal of the dams which caused the interference.⁵³

In *Dya Singh v. Ralia Ram*,⁵⁴ the suit was for the removal of a wall which the plaintiff alleged had been built on his land. The defendant pleaded that the plaintiff had acquiesced in the defendant's erection of a three-storied building supported by that wall. The value of the wall and the land on which it was situate was less than Rs. 500, and under Sec. 40, cl. (a), Act. XVIII of 1884, the appeal could not lie to the Chief Court unless the decree involved directly some claim to a question respecting property exceeding Rs. 500. Mr. Rattigan urged that, it was impossible to remove the wall without materially disturbing the three-storied building which was bounded by and partly supported by this wall, that those three-storied rooms were

⁵⁰ I L. R. IV All. 320.

⁵¹ *Ram Ditta v. Mohamed Khan*, X P. R. 13.

⁵² *Mula Mal v. Gardmal*, 1857 P. R. No. 5.

⁵³ *Shahbaz Khan v. Dosa Khan*, P. R. No. 163.

⁵⁴ 1887 P. R. No. 26.

part of the case, inasmuch as one of the questions which was referred to the Lower Court for decision by the Chief Court when this case was here before on appeal was, whether the plaintiff has acquiesced in the building of those rooms, and that therefore the value of the rest of the house which was not actually situate over the land claimed by the plaintiff should be considered in calculating the value of the suit. This contention was over-ruled, however, on the ground that the words of Sec. 40, cl. (a), must be construed literally. The Chief Court said—"Plaintiff by his suit raised directly no claim to the rest of the house and no question regarding it. He merely claimed the strip of land and the wall on it. The fact that the rest of the house is joined to the wall does not enable the defendant to say that the right to that property is in any way questioned or affected by the decree. The physical consequences of removing the wall may entail additional expense on the defendant or possibly damage to the rest of the property, but this is scarcely a legal consequence directly arising from the decree. We consider that the word '*directly*' was purposely inserted in cl. (a), Sec. 40, for the express object of shutting out the indirect consequences of decrees."

132. In a suit by a mortgagee for possession of the mortgaged property, the value of the subject-matter is the charge he seeks to create against the property and not the value of the property itself. This was held by a Full Bench of the Punjab Chief Court in *Harnam Singh v. Kirpa Ram*,⁵⁵ in which the claim was by a second mortgagee whose mortgage was for Rs. 440, to redeem the first mortgage (whose mortgage was for Rs. 155), and to get possession of the mortgaged land, the mortgagor as well as the first mortgagee being the defendants. Barkley, J., in delivering the judgment of the Full Bench, referred to the Appeal No. 201 of 1885, where the suit was for a declaration that the plaintiffs were mortgagees for the sum of Rs. 163, of "land alleged to exceed Rs. 500 in value, and it was held that, only the interest of the mortgagees was in question," and said that "the redemption of the prior mortgage is

The mortgaged property is not the subject-matter in all the suits on mortgage.

included in the subject-matter of the suit for possession as mortgagee under the mortgage to the plaintiff for Rs. 440, part of the consideration for that mortgage being the sum to be paid to redeem the prior mortgage, the redemption of which is a condition precedent to the plaintiff's right to possession under the mortgage for Rs. 440, and that the value of the suit is therefore the value of the plaintiff's interest as mortgagee, which cannot exceed the sum secured by the mortgage to him." Referring to this, Plowden, J., in delivering the judgment of the Full Bench in *Rajo v. Dasu*,⁵⁶ said—"We think the same rule of valuation applies in the converse suit by a mortgagor against a mortgagee to obtain possession of property by redemption of the mortgage," as "the suit is essentially one between a mortgagor and mortgagee, as such, for the purpose of redeeming or buying out the interest of the mortgagee." The Allahabad High Court has also held the same. In *Gobind Singh v. Kallu*,⁵⁷ the plaintiff sued for redemption of a mortgage executed for Rs. 2,000, and Straight, J., in delivering the judgment of the Court said—"that the subject-matter in dispute was the mortgage and the mortgagee's right under it, which was only Rs. 2,000." The same Judges held the same again in *Bahadur v. Nawab Jan*,⁵⁸ Straight, J., observing that—"the value of the subject-matter of the suit was the value of that portion of the mortgagee's rights which the plaintiff alleged had been redeemed." The same rule will hold good if the suit is for possession by mortgagee not only against the heirs of the mortgagor on the basis of the mortgage, but also against other persons as trespassers. Rivaz, J., in *Dheru Mal v. Thakoor Das*,⁵⁹ delivering the judgment of the Court, said "The plaintiff is claiming entry on the land as mortgagee and not as owner, and it is, we think, immaterial that persons, other than the mortgagor, are obstructing him in his claim. The subject-matter of the suit depends upon the nature of the right or interest claimed, and not upon the nature of the defence set up by the defendants. We hold that the value of the present suit for jurisdictional purposes is the amount of the mortgage money, plus the other items claimed in the plaint."

⁵⁶ 1888 P. R. No. 44.
⁵⁷ I. L. R. II, All. 778.

⁵⁸ I. L. R. III All. 822
⁵⁹ 1891 P. R. No. 1

133. In suits for the partition of one's share in joint property, the share claimed by the plaintiff and not the entire property is the subject-matter. In *Lakshman v. Babaji*,⁶⁰ it was contended that the subject-matter of a partition suit by one who claimed his share from the other co-parceners was the whole joint estate. West, J., in delivering the judgment of the Bombay High Court, however, said—"In a sense this is so. The land and goods as a whole are the material substratum of the proprietary right, a part of which the plaintiff seeks to enforce. But in the sense of the Act (XII of 1887), the subject-matter is the jural relation between the parties as alleged by one and denied by the other, and that, in the case of a single aliquot part, is the ownership of such part." This decision was followed in *Ballah Mal v. Bhupa Mal*,⁶¹ which was a suit between Hindus for the partition of a house, and it was held, that—"for the purposes of jurisdiction, the true test of the value of the subject-matter in a suit where one co-sharer sues for partition of his share of a joint estate, is the value of the share which is sought to be divided." Tremlett, J., in that case said—"It is true that in these suits the Court usually deals with and partitions up the entire property, but this is rather an accident of the litigation than the direct object for which the plaintiff is entitled to come to the Court, which is only to separate off and declare as his sole property a portion of the entire estate. On principle, these suits for a partitioning of real property do not appear to me to differ from claims for a sum of money to be paid out of a specific fund, in which clearly the value of the suit would be the sum or share the plaintiff demanded, and not the specific fund from which it was to be taken." However, a suit for the partition of the undivided family property among Hindus is to be valued for the purposes of jurisdiction at the value of the entire property to be divided,⁶² as in such a suit relief can be given to all the co-sharers as in an administration suit. But even the Madras High Court has held, that a suit for the recovery of a share of inheritance among Muhammadans is to be valued

In suits for a share in the joint property that share is the subject-matter.

only with reference to the valuation of the share claimed,⁶⁵ and that the same rule will apply among Hindus, when the parties do not stand in the relation of co-parceners.⁶⁴

134. As to declaratory suits, the Calcutta High Court held in *Drapu v. Ishan Chunder*,⁶⁵ that even if the only relief sought is a declaration, that declaration being in respect of property of a value greater than Rs. 1,000, the Munsif has no jurisdiction to try the suit. Similarly Muttusami Ayyar, J., in his judgment in *Ganapati v. Chathu*,⁶⁶ said—"For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared. The declaration is made in view to protect existing possession, but it is not intended that Courts with limited pecuniary jurisdiction should take cognizance of all suits for declaratory decrees irrespective of the value of the property to which the title declared by those decrees might relate." This decision was followed by Muttusami Ayyar and Parker, JJ., in *Ibrayan v. Komamutti*,⁶⁷ in which the plaintiff sued as *karnavan* for a declaration that he was a member of it, and this declaration he desired to obtain carried with it a recognition of his right to present possession of the tarwad property. In *Bai Mahkor v. Bulakhi*,⁶⁸ the plaintiff sued to obtain a declaration that she was the heiress of a certain person, and as such entitled to inherit his property. It was urged that the Court had not to look to any property in the case, as a declaratory decree alone was sought. "The contention that no property is involved" said the Lower Appellate Court "is merely verbal, depending on the form the suit has been made to take. The only possible consequential relief in the case would be the award of property. . . . The effect of a declaration of right in the plaintiff's favor would, it is clear, be to give her possession of the property, so far as

⁶⁵ *Khanza Bibi v. Syed Abba*, I. L. R. XI Mad. 140.

⁶⁴ *Krishnasami v. Kannakasabai*, I. L. R. XIV Mad. 183.

Narayanan v. Narayanan I. L. R. XV Mad. 69.

⁶⁵ IX C. L. R. 231.

⁶⁶ I. L. R. XII Mad. 2.

⁶⁷ I. L. R. XV Mad.

⁶⁸ I. L. R. I Bom. 535.

the defendant is concerned; for, on a suit by the plaintiff to obtain possession, it would not be competent to the defendant to contest the plaintiff's right. As held, therefore, by this Court in several recent cases, it follows that the Lower Court had no jurisdiction; it is not competent to a Court to make a declaratory decree in a suit where it could not grant consequential relief, if asked to do so. Here the Lower Court could not have entertained a suit to recover the property, and, therefore, it is incapable of making any binding declaration of right affecting that property." In delivering the judgment of the High Court on appeal, Kemball, J., after observing that the real question was, what was the subject-matter of the suit, said: "We do not think there is much force in the argument that a distinction exists between a suit to have a declaration of right and a suit for possession dependent on that right, and that the object of such a declaratory suit being merely to establish the fact of a right resident in the plaintiff, that right, and not the property (the possession of which can be obtained only by a subsequent suit), is the subject-matter of the suit. It appears to us perfectly clear that whether the suit be merely for a decree declaratory of title to, or whether it be to establish title coupled with a prayer for possession of, the rights of the deceased person, *the inheritance* is the object in dispute. . . . Lastly, the appellant argues that it is not proper to take the value of the deceased's estate as the value of the subject-matter, seeing that it may possibly be charged with debts and legacies which would considerably reduce the amount coming into his hands. With that the District Court had nothing to do. The plaintiff asked to be declared entitled to the inheritance; and in considering whether the claim was properly valued, the Court obviously could not estimate the value the estate might eventually represent to the plaintiff." The decision in *Andale v. The Secretary of State for India*,⁶⁹ is not against that view, as Sir Arthur Collins, C. J., and Mr. Justice Shephard in that case only said, "By the decree in Appeals Nos. 80 and 105 of 1886, the Crown is entitled to the remainder of the estate after a sufficient portion has been set apart for the performance of the trusts of the will. . . . If the decree has not

⁶⁹ III. M. L. J. 242.

been executed, the value of the suit for purposes of jurisdiction must be calculated on the whole value of the property which will eventually devolve on the Crown under the decree." The Madras High Court has held in a suit by a reversioner to have an adoption set aside or declared invalid, that the subject-matter of the suit is the value of the interest that would be lost to the adopted person, if the adoption should be declared invalid; and the jurisdiction will not be affected by what the reversioner calculated as his interest in that case.⁷⁰ A Division Bench of Allahabad High Court has, however, dissented from that decision recently in *Sheo Devi Ram v. Tulsi Ram*,^{71a} and held that in such cases it is for a plaintiff to put his own valuation on the relief which he claims. Knox and Burkitt, J.J., in the judgment of the High Court, further said: "We do not see why we should import into a suit, which only asks for a declaration, that a certain deed is invalid, the consideration that at some future time, the plaintiff or the defendant may or may not enter into or be entitled to claim some property by virtue of the decree which may be passed in that suit." In *Joynath Roy v. Lall Bahadour Singh*,⁷¹ the suit was for a declaration that the plaintiff's co-sharers were not entitled to insist on the *batwara*, inasmuch as there had already been a private partition of the *mehal*, and he and the other co-sharers held their respective shares separated in accordance therewith, and the Calcutta High Court held that the plaintiff's shares in the *mehal* and not the entire *mehal* would be the subject-matter. A Munsif had held the suit to be beyond his jurisdiction on the ground of the value of the entire *mehal* being in excess of the limit of his pecuniary jurisdiction, but the High Court remanded the suit to him, directing him 'to adjudicate upon the plaintiff's claim to be in possession of certain lands as comprising his share in the estate; and on his succeeding in proving his claim, to declare that those lands belong to his divided share.' Maclean, J., further observed, that—"the suit should either have been considered to be one for a declaratory decree, or for something in the nature of an injunction," and that the case resembled that of *Ajoodhia Lall v. Guman Lall*,⁷² in which it was held that it was unnecessary to value the suit according to the value of the entire estate.

⁷⁰ *Keshava Sanabhaga v. Lakshminarayana*,
I. L. R. VI Mad. 192.
^{70a} I. L. R. XV All. 378.

⁷¹ I. L. R. VII Cal. 120.
⁷² II C. L. R. 134.

135. In *Krishnama v. Srinivasa*,⁷³ the suit was for a declaration as to the liability of certain property for attachment in execution of a decree, and Sir Charles Turner, C. J., and Muttusami Ayyar, J., said—"The value of the subject-matter in suits such as that before us must depend on two considerations—the amount of the charge, and the value of the property it is sought to make available for the satisfaction of the charge. If the value of the property is in excess of the charge, the value is the amount of the charge, for the subject of the suit is the right to make the property available for the satisfaction of the whole charge; but where the value of the property is less than the amount of the charge, the subject-matter is the right to make the property available for the satisfaction of the charge so far as the property will suffice, and it cannot suffice to satisfy more than a sum proportionate to its value, and consequently in such cases the value of the subject-matter is the value of the property." In *Durga Prasad v. Rachla Kuar*,⁷⁴ the claim was to have certain property of the value of Rs. 400 declared liable to sale in execution of a decree, for Rs. 1,500, and Oldfield, J. (with whom Brodhurst, J., concurred) said—"that the value of the property which the decree-holder seeks to have sold, determines the jurisdiction in this suit, and it is immaterial whether the amount of the decree is higher than the limit of the Munsif's jurisdiction." The learned Judge distinguished the case of *Gulzari Lal v. Jadaun Rai*,⁷⁵ on the ground that—"in that case the value of the property in suit was higher than the amount of the decree, and the valuation was rightly limited to the amount of the decree, that being all that was recoverable in the event of the plaintiff being successful." In *Modhusudan Koer v. Rakhal Chunder*⁷⁶ also, the value of the property in respect of which the declaration was asked was more than the amount of the decree, and the Calcutta High Court approving of the decisions of the other three High Courts, held that the jurisdiction would be determined by the amount of the decree, and not by the value of the property, as it was that amount which was in dispute, and which the

Subject-matter in suits relating to the attachment of property in execution of a decree.

⁷³ I. L. R. IV Mad. 339.
⁷⁴ I. L. R. IX All. 140.

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⁷⁵ I. L. R. II All. 790.
⁷⁶ I. L. R. XV Cal. 104.

creditor would recover if successful. This decision was followed by the Punjab Chief Court in *Harnam Singh v. Bhagwan Devi*⁷⁷ and in *Maya Mal v. Bela Singh*,⁷⁸ Sir Meredith Plowden, J., in delivering the judgment of the Chief Court, said—"the value of a suit by a decree-holder to establish the right of his judgment-debtor in property released from attachment is the value of that right to the plaintiff. Where the value of the property exceeds the amount of the decree, the value to the plaintiff is limited to the amount of his decree, and when the amount of the decree exceeds the value of the property, the value to the plaintiff is the value of the property. The same will be the case even in suits for the release from attachment of property attached in execution."⁷⁹ In *Gulzari Lal v. Jadaun Rai*,⁸⁰ the claim was for a declaration of "the plaintiff's right to some grain, by setting aside an order of the Munsif for bringing it to sale in execution of a decree held by defendant against a third party, his judgment-debtor;" and Oldfield, J., in the judgment of the High Court, said—"A course of decisions of this Court has held that the value of the subject-matter in dispute for determining jurisdiction will be in such cases the amount of the decree in satisfaction of which it is sought to bring the property to sale." On the same principle, it was held in the United States in *Hoppe v. Byers*,⁸¹ and in *Paul v. Arnold*,⁸² that in attachment proceedings, the amount of the judgment and costs, and not the value of the property attached, would determine jurisdiction.

136. As a general rule, the value of the subject-matter of a suit for the purposes of the jurisdiction of the Courts is, when capable of a money-valuation, the actual value of the property or right in litigation. It is quite irrespective of and perfectly distinct from the valuation of the suit for the fiscal purposes of the levy of Court fees; the amount of which for the sake of convenience has to be determined by the aid of certain rules framed so as not only to give a rough approximate value of the subject-matter, but also to adjust with a regard to administrative expediency, the incidence of the burden of taxation on the different classes

1890 P. R. No. 50.
1890 P. R. No. 121
Motchand v. Dadabhai, XI B. H. C. R. 196.

80 I. L. R. II All. 799.
81 39 Iowa 573.
82 29 Ind.

of persons and the different sorts of business coming before the Courts. The Court Fees Acts are therefore not to be resorted to for construing enactments which fix the valuation of suits for the purposes of determining jurisdiction. This is the rule that has always been recognized and acted upon by their Lordships of the Privy Council⁸³ as well as by the Indian High Courts,⁸⁴ and has latterly been explained and followed by the Bombay High Court in *Dayachand V. Hemchand*,⁸⁵ and by the High Court, Calcutta, in *Aukhil Chunder v. Mohiny Mohun Dass*.⁸⁶

In the Madras Presidency, a different rule was enacted by Sec. 14 of the Madras Civil Courts Act, which provided that—"when the subject-matter of any suit or proceeding is land, a home or a garden, its value shall for the purposes of the jurisdiction be fixed in the manner provided by the Court Fees Act, 1870, Sec. 7, cl. 5. Recently the Suits Valuation Act (VII of 1887), has enacted still more broadly a rule which may be considered as of a general application. Sec. 8 of this Act provides that—"where in suits other than those referred to in the Court Fees Act, 1870, Sec. 7, paragraphs v, vi, ix and paragraph x, cl. (d), Court fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same." Sec. 9 of the same Act further provides that—"when the subject-matter of suits of any class, other than suits mentioned in the Court Fees Act, 1870, Sec. 7, paragraphs v and vi and paragraph x, cl. (d), is such that, in the opinion of the High Court, it does not admit of being satisfactorily valued, the High Court may, with the previous sanction of the Local Government, direct that suits of that class shall, for the purposes of the Court Fees Act, 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf." A suit for the ejectment of certain tenants at fixed rates on account of acts alleged to have been done by them inconsistent with the purposes for which the land was let, was held in *Ram Raj v. Girnandan*,⁸⁷ to be a suit for possession within the meaning of paragraph v. Sec. 7 of the Court Fees Act; and Sir John Edge, C. J., and

⁸³ *Lekhraj Roy v. Kanhya Singh*, L. R., I. I. A. 317.

Mohun Lall v. Behee Dass, VII M. I. A. 428.

⁸⁴ *Bai Mahkur v. Bulakhi Chaku*, I. L. R., I Bom. 538. *Jeebraj Singh v. Inderjeet Mah-*
ton, XII B. L. R. 115 (a).

Nanhoon Singh v. Tofanoo Singh, XII B. L. R. 113.

⁸⁵ I. L. R. IV Bom. 515.

⁸⁶ I. L. R. V Cal. 489.

⁸⁷ I. L. R. XV All. 263.

Aikman, J., said—"The result is that in suits under Sec. 93 cl. (b), Act. XII of 1881, the value for the purposes of Court fees and the value for purposes of jurisdiction have to be computed in the same way, namely, by ascertaining the value of the subject-matter. The subject-matter here cannot be treated as the land itself, as the landlord, plaintiff, has, through his tenants, proprietary possession, and what is really sought is to free the land from the possession of the tenants holding as tenants at fixed rates, that is, to get rid of the tenants and their tenant rights, and that is a relief the value of which is easily ascertainable." A suit for the restitution of conjugal rights and possession of wife is "not one to which any special money value can be attached for the purposes of jurisdiction."⁸⁸ Nor will its valuation be considered above Rs. 10,000, simply because the plaintiff in his plaint and the defendant in his petition of appeal recorded it as worth Rs. 25,000.⁸⁹ A suit for the removal of a *karnavan* is not a suit for the recovery of the *tarwad* property, and does not admit of a valuation.⁹⁰

137. The proper valuation of the subject-matter of a suit is particularly important as it determines the question of essential jurisdiction throughout the suit. The jurisdiction over proceedings taken for the execution of decrees and orders passed in a suit, and over appeals from them is determined primarily by the amount or value of the subject-matter of the original suit. As to the appeals, that rule is enacted expressly in the Civil Procedure Code, and in the various Acts by which the jurisdiction of Courts is prescribed. Appeals to Her Majesty in Council are as a matter of right allowed only when "the amount or value of the subject-matter of the suit in the Court of first instance" is ten thousand or upwards.⁹¹ It is also provided that in the case of such appeals, the amount or value of the matter in dispute on appeal must not be less than that amount, but in the case of all other appeals the valuation of the dispute on appeal is not considered even in determining whether an appeal is to lie. An appeal from the decrees or orders of Lower Appellate Courts lies generally to the High Court. As to appeals from decrees of the Original Courts, the Civil Procedure Code provides, as a general rule, that an appeal when allowed shall lie "to the Courts authorized to hear appeals

⁸⁸ *Gulam Rahman v. Fatima Bibi*, I. L. R. XIII Cal. 232.

⁸⁹ *Mowla Nawaz v. Sajidunnissa*, I. L. R. XVIII Cal. 378.

Kunhi Raman v. Puttalathu, I. L. R. IV Mad. 314.

Sec. 500, Act XIV of 1882.

from the decision of those Courts.⁹² As to an appeal from any order, it is similarly provided that—"It shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made."⁹³ As to the Courts authorised to hear appeals, the provisions of the Acts for the Courts in the different Provinces are not quite the same. The Bengal, North-Western Provinces, and Assam Civil Courts Act provides⁹⁴ that an appeal from a decree or order of a District Judge or an Additional Judge, or of a Subordinate Judge in suits exceeding Rs. 500, will lie to the High Court, but that from all other decrees or orders of a Subordinate Judge and from all those of a Munsif will lie to a District Judge, or, if specially authorised by the Local Government, to a Subordinate Judge. Similarly, the Madras Civil Courts Act, 1873, provides,⁹⁵ that "appeals . . . shall lie from all the decrees and orders of a District Court, and from those of a Subordinate Judge in suits far more than Rs. 5,000, to the High Court, and from those of Subordinate Judges in other suits and of District Munsifs to the District Court."

The Punjab Courts Act provides that in cases in which an appeal is allowed, an appeal will lie from the (1) decree of a Munsif in Small Cause cases when the value of the suit does not exceed five hundred rupees to the District Judge, (2) from the decrees of a District or Subordinate Judge in original suits exceeding five thousand rupees, and from the decrees of the Divisional Court in original suits and in certain specified cases in appeals,⁹ to the Chief Court; (3) and from decrees in original suits, not otherwise provided for, to the Divisional Court.⁹⁶

It has sometimes been contended that the appeal should be held to lie to the Court having jurisdiction over the amount in dispute in the appeal. In *Muthusami Pillai v. Muthu Chidambara*,⁹⁷ the District Judge construed the word *suit*

g (a) If the value of the suit exceeds five hundred rupees, or the decree involves directly some claim to, or question respecting, property of like value ;

(b) if the Divisional Court consists of a single Judge, and the decree varies or reverses the decree of the Court below ;

(c) if in a Divisional Court consisting of more than one Judge the appeal is heard by two or more Judges, and there is not a majority of those Judges concurring in the decree passed by the Divisional Court ;

(d) if on the application of any party, a Judge of the Divisional Court certifies that there is a question of law or custom or of general interest involved, and that the case is in his opinion of sufficient importance to justify a further appeal.

Sec. 540 Act XIV of 1882.
Sec. 589 Act XIV of 1882.
Secs. 20 and 21 Act XII of 1887

⁹² Sec. 13 Act III of 1873.
⁹³ Secs. 39 and 40, Act. XVIII of 1884.
⁹⁴ VII M. H. C. R. 356.

in such a case as meaning a suit on appeal, as if the words were "the amount or value of the subject-matter in dispute in the appeal," and referred to various anomalies as likely to arise from a different construction. A Full Bench of the Madras High Court held against that view, on the ground that—"the language of the Legislature is clear and that the intention was to make the value of the suit, and not of the matter in dispute in the appeal, the criterion by which to determine appellate jurisdiction."

The language of Sec. 22 of Act VI of 1871 was less distinct, and provided that appeals from the decrees and orders of Subordinate Judges shall lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000; but even with regard to it the same was held on general principles by a Full Bench of Calcutta High Court in *Neerbhoy Singh v. Rampershad Singh*,⁹⁸ in which Sir Richard Couch, who delivered the leading judgment, referring to the language of that section, said:—"I cannot see any reason for supposing that, in this section, the Legislature intended, by 'subject-matter in dispute,' the subject-matter in dispute in the appeal. And there is this reason, I think, for its not being so; the appeal is only a stage in the suit; it is not a fresh suit, but a part of the proceedings in the suit, and therefore, ordinarily, I should say that, with regard to the jurisdiction in appeals from decrees and orders of the District and Subordinate Judges, the expression 'the subject-matter in dispute' would mean the subject-matter in dispute in the suit itself, unless, of course, a contrary intention appeared, as in appeals to the Privy Council, where the language is 'the subject-matter in dispute in the appeal.' Then there is another and a cogent reason why that construction should be adopted, and that is the extreme inconvenience, or worse than inconvenience, which would arise if the other construction were adopted. There might be, and, no doubt, there would be, cases, and probably many, in which the decree being for a smaller sum than Rs. 5,000, and the whole suit coming by the appeal, as it must, before the District Court, it would be open to the respondent to object, without bringing any cross-appeal, that the decree ought to have been for a larger amount or for the whole of the sum claimed; and, thus, the District Court, as an Appellate Court, would have to adjudicate upon the right

to a sum exceeding Rs. 5,000, and in a suit of the description that ought to come to the High Court in appeal. There might also be the further difficulty that the plaintiff, having got a decree for less than Rs. 5,000, being dissatisfied with it, and considering that he was entitled to the whole sum which he claimed, might appeal to the High Court against it, the other party appealing to the District Court against the decree as it affected him." In *Jag Lal v. Har Narain Singh*⁹⁹ it was contended, "that where a plaintiff values his claim at a particular sum of money, and the defendant raises a plea disputing such valuation, reducing it to a sum lower than that named by the plaintiff, an unsuccessful defendant in such a litigation has got a right, in appealing from the decree of the first Court, to go not to the Court which would have jurisdiction with reference to the pecuniary valuation of the suit, but to the Court which with reference to the defence set up by the defendant as to the valuation of the suit would ordinarily have jurisdiction." Mahmood, J., said, however, "that this contention is entirely unsound. Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint. A plaintiff may sue for a million pounds as damages either for a tort committed or as the value of certain movable property which can no longer be recovered. The defendant may, in such an action, plead that the amount of damages claimed is excessive, and the value of the property is also exaggerated, and that in either case all that the plaintiff is entitled to is far less than the million pounds. The question is at which assessment the question of jurisdiction is to be settled? Is it the valuation of the claim as preferred by the plaintiff or the plea set up in defence? I have no hesitation in saying that it is the valuation of the plaint which would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. In support of this view I need only cite the Full Bench ruling of this Court in *Mahomed Hossein Khan v. Shib Dyal*,¹⁰⁰ and the views expressed by my brother Straight in *Gobind Singh v. Kallu*."¹ The same view is taken by the American Courts. The Massachusetts Supreme Court held in *Hemmenway v. Hickes*,² that the right of appeal would be determined by the amount

⁹⁹ 1 L. R. N. A. 11 624
¹⁰⁰ V A. 11. H. C. R. 106.

¹ 1 L. R. 11 A. 11. 778.
² 4 Pick. 497.

claimed in the *ad damnum* clause, and not by the amount erroneously decreed in excess thereof. In *Lord v. Goldberg*,³ Belcher, C. C. in delivering the judgment of the California Supreme Court said: "Under our present constitution and laws, when an action is brought to recover a money demand, the *ad damnum* clause of the complaint is the test of jurisdiction. If the amount sued for is large enough to give the Superior Court jurisdiction, the Supreme Court has jurisdiction on appeal; and this is so whether the appeal be taken by the plaintiff or defendant."⁴ This decision was followed under the present Act in *Mahabir Singh v. Beharilal*⁵ in which Sir John Edge, C.J., and Knox, J., said: "It is clear that by Sec. 21 of Act XII of 1887, the jurisdiction of the District Judge in appeal is to be determined by the value of the original suit and not by the value of the appeal." The same view has been taken in *Radha Prasad Singh v. Pathan Ojah*,⁶ in which it was contended that the value for the purpose of jurisdiction was the real value of the subject-matter in dispute, and not the value which was stated by the appellant in the plaint solely for the purposes of the Court-fees Act. This contention was overruled however, Knox and Burkitt, J.J., referring to the above decision with approval, and saying: "As the appellant had in his plaint himself put a value on the relief he asked for, and as that value was not questioned by the other side and was accepted by the Court of first instance, we are not in a position now to entertain the question as to whether it was or was not the correct value of that subject-matter."

In *Mootoo v. Verapah Chetty*,⁷ the claim was brought under Sec. 246 of the Code of 1859, only for a certain property valued at Rs. 1,590, and Sir Richard Couch, C.J., said:—"That is the amount or value of this suit, and he (plaintiff) cannot by valuing it at Rs. 3,100, when his own statement shows that the value is only Rs. 1,590, and the difference is made up by damages which he does not claim in the suit, obtain a right of appeal to this Court." *Mesne* profits, if demanded by the plaintiff, must of course be admitted into the calculation of the appealable value,⁸ the measure of value for determining a plaintiff's right of appeal being the amount for which the defendant has resisted the decree. As a natural result, how-

³ 15 Am. St. Rep. 84.

⁴ *Dashiell v. Singerland*, 60 Cal. 653.

⁵ *Bailey v. Sloan*, 65 Cal. 387.

⁶ L. L. R. X All.

L. L. R. XV All. 364.

XVII W. R. 248.

Mohideen v. Pitchay,

ever, of the principle on which jurisdiction in appeal is taken, interest or costs subsequently accruing cannot be included for the determination of the jurisdiction.

138. As to the jurisdiction over proceedings in execution of a decree, Sec. 223 of the Civil Procedure Code primarily enacts that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions of the Code. It further provides, in effect, that the Court passing it may send it for execution on the decree-holder's application to any other Court for any sufficient reason, and on its own motion to any Subordinate Court. There is no express provision of law as to whether the Court to which a decree may be so sent must be a Court having jurisdiction over the amount of the suit in which the decree was passed, or whether the mere sending of the decree will confer jurisdiction on a Court for all the proceedings to be taken in its execution. As to the rule in the Punjab, Plowden, J., in delivering the judgment of the Full Bench in the case of *Ganga Ram v. Gur Saran Das*,⁹ said: "Notwithstanding execution proceedings are not mentioned by name, the 'civil business' which Sec. 35, Act XVIII of 1884, allows the District and Divisional Courts by written order to distribute among their Subordinate Courts, is an expression clearly wide enough to include those proceedings, and they may therefore be sent to any such Court competent to deal with them. As Act XVIII of 1884 does not expressly deal with the jurisdiction of the Courts in the matter of execution-business, we have to fall back on the Civil Procedure Code, and Secs. 223 and 230 of this Code show that there is no limitation on the powers of an Original Court to execute decrees of any value; for Sec. 223 (*d*), cl. 2, allows a Court which has passed a decree to send it for execution to any Court subordinate to it. Thus a District Court might send a decree it has passed for a lakh of rupees to a Munsif to execute, and under Sec. 230, the Court to which that decree was sent would have to execute it. The pecuniary and other limitations referred to in Secs. 16 and 17 in regard to regular suits are altogether absent in the sections relating to execution-proceedings." In *Narasayya v. Venkatakrishnayya*,¹⁰ Sir Charles Turner, C. J., and Muttusami Ayyar, J.,

held the same on the very same ground, observing that—"the description of the Court to which proceedings in execution may be transferred is limited only by the condition that it be a Court subordinate to the Court which passed the decree," and that, "an extraordinary jurisdiction is conferred by the Civil Procedure Code in cases to which Sec. 223, para. 7, relates." The contrary was held in *Sidheswar v. Harihar*,¹¹ in which case the application for execution was made to a First Class Subordinate Judge, and referred by him for disposal to a Second Class Subordinate Judge. In this case, however, the point appears to have been rather assumed than decided, Sir Charles Sargent, C. J., and Nanabhai Haridas, J., only observing that—"as the Second Class Subordinate Judge could not have entertained the suit, so neither could he deal with it in execution."

Even in this view, however, the pecuniary value of the particular matter decided by the order in execution is immaterial, as even in such a case the value of the original suit is held to determine the Court to which an appeal will lie from the order.¹² Sec. 649 further provides that in Sec. 223 "the expression 'Court which passed a decree' or words to that effect shall, unless there is something repugnant in the context, be deemed to include, where the decree to be executed is passed in appeal, the Court which passed the decree against which the appeal was preferred, and where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making application, for execution of the decree, would have jurisdiction to try such suit." And these words draw no distinction as to the nature of the cause which puts an end to the jurisdiction, and are comprehensive enough to include the case in which the Court ceases to have jurisdiction on account of an alteration in the status of any of the parties concerned.¹³

¹¹ I. L. R., XII Bom. 155.

¹² *Narbharam v. Navnidram*, V B. H. C. R. A. C. 46.

¹³ *Vishnu v. Krishnarao*, I. L. R. XI Bom. 151.
Gaukha v. Abdul Ropkha, I. L. R. XVII Bom. 162.

CHAPTER VI.

LOCAL AND PERSONAL JURISDICTION.

139. The other peculiarity of the Indian judicial system to which reference has already been made, is that for the exercise of judicial power, the entire country is divided and subdivided into small local areas, varying for different grades of Courts, and generally liable to a change by the Executive Government. The limits of those areas determine the local limits of the Courts' jurisdiction for the trial of original suits and of appeals. Real difficulty in connection with the question of local jurisdiction consists in what may be called the localization of suits, and elaborate rules have therefore been enacted by the Legislature for determining the circumstances in which a suit may be taken cognizance of by the Courts having jurisdiction in any particular area. The Civil Procedure Code, 1859, provided broadly that the Civil Courts would take cognizance of suits for land or other immovable property, situate within the local limits of their respective jurisdictions, and of other civil suits "if the cause of action shall have arisen or the defendant at the time of the commencement of the suit shall dwell or personally work for gain within such limits." The first Charters of the High Courts at the Presidency-towns conferred original jurisdiction on the High Courts in the same cases, but provided as to transitory actions, that the High Courts would have cognizance of them even if the defendant only carried on business within the local limits of their jurisdiction. The Revised Charters, that still regulate the jurisdiction of the Presidency High Courts, further provided for the necessity of obtaining special permission when only a part of the cause of action should have arisen within the local limits of their ordinary original jurisdiction. There has been a great conflict of opinion, however, as to every one of the essentials of the jurisdiction, for which provision has been made by these Charters.

140. The High Courts did not agree even as to what were suits for land or other immovable property. In *Raj Mohun v. E. I. R. Co.*,¹ the complaint was of a nuisance committed against plaintiff's premises in Howrah by

Provisions as to local jurisdiction in the Civil Procedure Code 1859, and the High Courts' Charters.

Conflict of opinion as to the nature of suits relating to immovable property.

the defendant Company's works built there, and the plaintiff prayed that the defendant Company might be restrained by injunction from continuing the nuisance. Mr. Justice Macpherson held, that the suit was not "for land or other immovable property" within the meaning of Sec. 12 of the Letters Patent or of Sec. 5 of Act VIII of 1859, observing that—"it is a suit exclusively *in personam* where the person against whom relief is sought is within and subject to the jurisdiction, though the relief sought is in respect of acts done on land situated beyond the local limits of the original jurisdiction." In *Juggodumba v. Puddomoney*,² a suit was brought by some of the persons appointed trustees, under a deed of endowment of certain land outside Calcutta, against their co-trustees who were in possession and were alleged to have ousted the plaintiffs and to have committed other breaches of trust, and the plaintiff prayed for a declaration that the plaintiffs were entitled to be *Sebaits* jointly with the defendants for the settlement of a scheme for the performance of the worship, for the appointment of a receiver, for an injunction to restrain the defendant from interfering with the property, and for an account; and the suit was held not to be a suit for land or other immovable property and therefore cognizable by the High Court on its original side. On the other hand, a suit to carry out the trusts of a deed relating to certain immovable property was held in *Delhi and London Bank v. Wordie*,³ to be a suit for land; Sir Richard Garth, C. J., observing in the judgment of the Court that—"the suit being confessedly instituted for the purpose of dealing with the lands in their entirety, and these lands being by far the larger portion of the partnership assets, this is in substance a suit for land within the meaning of the clause relating to jurisdiction in the Charter. It will certainly be a suit for a right to or interest in immovable property." This decision, along with some others, was relied upon by the defendant in *Kellie v. Fraser*,⁴ in which an application was made to file an arbitrator's award, which related to certain partnership lands outside the local limits of the Court's jurisdiction, and provided that the partnership should be dissolved on certain terms, that the defendant's share in the property should stand charged with the payment of a certain fund to be due by him to the plaintiff, and that the defendant should execute a mortgage of his share to the plaintiff as security for such

payment, and that the tea garden at Darjeeling should be sold in Calcutta. The application was held to lie in the High Court, as the object of a suit to enforce the award would not involve the determination of any title to the land, and would not be a suit for land. The decision in *Delhi and London Bank v. Worlie*, was in this case distinguished on the ground that the object of that suit was to establish the title of certain trustees to a share in a portion of the trust property, and the establishment of that title was an essential element of the entire claim, and Macpherson, J., said—"The mere fact that the object of the partnership was the carrying on of a tea concern does not make a suit for adjustment of accounts and dissolution, a suit for land. If it did, then this result would follow that, although all the members of a partnership were permanently resident in Calcutta, and the chief business of the partnership was, at the time of suing, and always had been, conducted in Calcutta, a suit for an account and dissolution would not lie here, if one asset of the partnership happened to be an indigo factory or a tea garden in the Mofussil. Yet, in the case suggested, there can be no manner of doubt a suit could be entertained by the Court on its original side; and such suits have, in fact, been repeatedly entertained." A suit to recover title-deeds, although it may involve a question of title, has been held not to be a suit to obtain possession of land, or to deal in any way with the land itself, within the meaning of the Charter.⁶ In *Sreenath v. Cully Doss*,⁶ Pontifex, J., held, that a suit for the specific performance of a contract for the execution of a mortgage of certain immovable property situate outside Calcutta was a suit for a right to or interest in immovable property, and therefore beyond the jurisdiction of the High Court.

The Bombay High Court, dissenting from that decision, has taken a broader view and extended the jurisdiction of the High Court on its original side to all the suits relating to immovable property, to the cases in which the English Courts assume jurisdiction even when the immovable property is situate outside England. Thus Sir Charles Sargent, C. J., in the judgment of the Court in *Holkar v. Dadabhai*,⁷ said—"The present suit, whether it be regarded as a suit for specific performance or to enforce an equitable mortgage by deposit of title-deeds, is clearly one which a Court of

⁶ *Brijnath*, 1. L. R. IV Cal. 1

⁶ 1. L. R., V Cal. 82.

⁷ 1. L. R. XIV Bom. 359.

Equity in England would entertain,⁸ and in which, as appears from 2 Spence's Equity Jurisprudence, p. 678, and Coote on Mortgages, vol 2, p. 992,⁹ they would, if the land were in the colonies where it is the practice in mortgage suits to enforce the security by sale, make an order for sale, instead of one for foreclosure. The High Courts in India have all the powers of a Court of Equity in England for enforcing their decrees *in personam*;¹⁰ and we think that, had it been intended to exclude suits *in personam* as well as suits *in rem* from the jurisdiction of the High Courts, the framers of the Letters Patent, who were presumably English lawyers, would have employed different language."^a There was a similar conflict of opinion as to the practice of the other Civil Courts. The Bombay High Court taking the same liberal view, held in *Yenkoba v. Rambhaji*,¹¹ that a suit brought in the Mofussil Courts to recover mortgage-money by a sale of the mortgaged property was not for immovable property. Gibbs and Melvill, J.J., said in the case—"that a suit for land is a suit which asks for delivery of the land to the plaintiff;" and observed that "the Court of Chancery, though it has no power directly to affect property situate out of the bounds of its jurisdiction, and will not therefore try the validity of a will of land in the Colonies though made in England;¹² nor entertain a bill of partition;¹³ yet will order the sale of an estate in the Colonies, in order to realize a sum of money charged upon it."¹⁴

The High Courts at Allahabad,¹⁵ and Calcutta took a contrary view. In *Ram Lall v. Chittro Coomaree*,¹⁶ the major portion of the mortgaged premises was situate within the local jurisdiction of the Court, and yet the Calcutta High Court held, that it had no jurisdiction, on the ground that it being a suit to have certain lands declared liable for the satisfaction of the *kistbundi* executed by the defendants in favor of the plaintiff, it was substantially a suit for an interest in land. The same was held in *Leslie v. The Land Mortgage Bank of*

^a The Calcutta High Court had also taken a similar view in an earlier case, in which it held that a suit for the specific performance of a contract to sell lands situate outside Calcutta was cognizable by the High Court on its original side;¹⁷ but the decision was not followed there.

⁸ Paget v. Ede, L. R. 18 Eq. 115.

⁹ 5th Ed.

¹⁰ Martin v. Lawrence, L. L. R. IV Cal. 655.

Hassanbhoy v. Cowasji Jehangir, L. L. R. VII Bom. 1.

¹¹ IX B H C R 12

¹² Abr. 183.

¹³ Gascoigne v. Douglas, Dick. 431.

Noel v. Robinson, 1 Ver. 181.

¹⁴ Buldeo Dass v. Mool Koor II All. H. C. R. 19.

Luchmeenath v. Madho Dass, II All. H. C. R. 70.

¹⁵ XV W. R. 277.

¹⁷ Ram Dhona v. Nobumony, Bourke, O. C. 215.

India,¹⁸ in which Markby, J., in delivering the judgment of the High Court said—"The plaint, so far as it asks for a sale of the mortgaged property in satisfaction of the mortgage-debt, is a 'suit for land' within the meaning of Sec. 5 of the Code of Civil Procedure which regulates the jurisdiction in this case. Mr. Branson contended that these words should be read as signifying those suits alone in which the land itself was sought directly to be recovered. It was admitted that a much wider construction had been put by Mr. Justice Macpherson upon the similar words of the Charter of the High Court; that learned Judge holding that a suit for foreclosure by the mortgagee was, as such, a suit for land,¹⁹ and that a suit for redemption was so also,²⁰ but it was contended that these decisions were not correct. We see no reason to suppose this. They have never been questioned as far as we are aware. On the contrary, the uniform practice of this Court on its original side has been in accordance with them. They are also supported by the decision reported in IX Weekly Reporter 173,²¹ where it was held that a suit brought to enforce a security against land was a suit for recovery of an interest in immovable property within the meaning of cl. 12 of Sec. 1 of Act XIV of 1859. Upon the authority of these decisions, I hold that a suit for land includes any suit in which a decree is asked for, operating directly upon the land, and therefore includes any suit brought to enforce a security upon land.^b It was contended, however, that this was a suit neither for foreclosure nor redemption, nor in any way to enforce a security upon land, but simply for money to be recovered by the sale of the plaintiff's property through an attachment and sale in the usual way. This, however, is not so. It is perfectly well established that a decree in a suit like the present in the Mofussil courts enables the plaintiff to sell the mortgaged property *as it stood at the time of the mortgage*, and clear of all subsequent incumbrances, and that such a sale completely bars redemption; whereas, a suit brought simply on the provision to repay the loan will only enable the plaintiff to sell the interest which the defendant has at the time of execution."

^b The same has been held by the other High Courts also, e.g., in *Chetti Gaundan v. Sundaram*; ²² *Krishna Row v. Hachapa*; ²³ *Raja Kundan v. Mattammal*; ²⁴ and *Koonj Behary v. Ram Narain*.²⁵

¹⁸ IX B. L. R. 171.

¹⁹ I. In. Jur. N. S. 40.

²⁰ I. In. Jur. N. S. 319.

²¹ *Surwar Hossain v. Golam Mahomed*, followed in *Munoo Lall v. Pigue*, X W. R. 379.

²² II M. H. C. R. 51.

²³ II M. H. C. R. 307.

²⁴ III M. H. C. R. 92.

²⁵ II

141. To avoid such conflicts in regard to the practice of the Mofussil Courts, the Civil Procedure Code of 1877, provided with some detail as to the jurisdiction over local suits. It enacted that suits for the recovery or the partition or for the foreclosure or redemption of a mortgage of immovable property ;—

Provisions as to the local jurisdiction in the present Civil Procedure Code.

(d) for the determination of any other right to or interest in immovable property ;

(e) for compensation for wrong to immovable property ;

(f) for the recovery of movable property actually under restraint or attachment ;

when the property should be situate in British India ; might be instituted in the Court within the local limits of whose jurisdiction the property, or any portion thereof, should be situate. This jurisdiction depending on the *situs* of the property in litigation is often designated territorial, as distinguished from personal which depends on the residence of the defendant or on the accrual of the cause of action. As to this last, the Code provided that suits to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant might, when the relief sought could be entirely obtained through his personal obedience, be instituted in the Court within the local limits of whose jurisdiction he actually and voluntarily resided or carried on business or personally worked for gain. This continued also to be the *forum* for all transitory suits, alternatively with the place of the accrual of the cause of action, it being further provided in the Code of 1877, that if there are more than one defendant, and any of them does or do not at the time of the commencement of the suit actually and voluntarily reside or carry on business or personally work for gain, the Court will not have jurisdiction on that account, unless he or they acquiesce in it or the Court gives leave. As an illustration of the same general principle, it was distinctly provided by Sec. 18 of the Code in regard to torts, that “ in suits for compensation for wrong done to person or movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the plaintiff may at his option sue in either of the said Courts.”

The same provisions were re-enacted without any modification in the Civil Procedure Code of 1882. In 1888, it has been further provided with regard to local suits that, "when it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more courts, any immovable property is situate, any one of those may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect, and thereupon proceed to entertain and dispose of any suit relating to that property."²⁶ . . . So also with regard to transitory suits, it has been enacted in 1888, with a view to do away with the difficulty constantly arising in practice from the more or less extensive sense in which the term cause of action has at different times been used and understood, that in suits arising out of contract, the cause of action arises as well at the place where the contract was made, as where it was to be performed or where in performance of the contract any money to which the suit relates was expressly or impliedly payable."²⁷

142. The Statute Book of British India does not at present contain any provision with regard to suits relating to immovable property situate outside British India. This is in accordance with the general principle of International Law, on account of which the courts in British India or any other country are not competent to take cognizance of suits for or relating to immovable property situate outside it. It is a first principle of International Law that the authority of the Government of a State and its courts extends to all the property in that State. As Mr. Freeman observes, "All property within a State is subject to the jurisdiction of its courts, and they have the right to adjudicate the title thereto, to enforce liens thereupon, and to subject it to the payment of the debts of its owners, whether residents or not."²⁸ "The State, through its tribunals, may subject property situated within its limits, owned by non-residents, to the payment of the demands of its own citizens against them, and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens, and, when non-residents deal with them, it is a legitimate and just

²⁶ Sec. 6, Act VII of 1888.

| ²⁷ Sec. 7, Act VII of 1888.

| ²⁸ Fr. Jud. 100.

S. 142.] NO JURISDICTION OVER IMMOVABLE PROPERTY OUTSIDE THE STATE.

exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then only be carried to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate." It is manifestly convenient also that all the suits relating to such property, either as to its tenure or as to its transfer, or as to the liabilities in respect of it, should be tried in the country where the property is situate. The convenience is especially marked in the case of suits relating to immovable property, the situation of which is permanent and does not admit of change. There is therefore a general rule of International Law that "disputes as to realty wherever situate are to be determined by the *lex loci rei sitae*." So comprehensive is this rule, that where an act committed in Pennsylvania caused the diversion of water from a mill in Ohio, an action on the case for such injury was held to lie in Ohio.²⁹ "It is a natural consequence of this, that all the nations assume jurisdiction over absent defendants, whether subject or alien, in all or nearly all suits relating to property within the territory." It was thus held in *Rice, Stix and Co. v. Peteet*,³⁰ that a non-resident could be sued in the courts of Texas when he should have effects in the State, without bringing those effects before the court by attachment or some similar process, to await final judgment. So also in *Harris v. Palmore*,³¹ it was held that a foreigner could be sued in the Courts of the State in which certain land was situate to compel a conveyance of title to the land for which the money had been paid and accepted; and the Supreme Court said,—"It would be strange, indeed, if Georgia courts had no jurisdiction to settle title to her own lands, because somebody claiming title thereto resided without her limits The result would be, that though sovereign over all her territory, though in her be the eminent domain, though her grant be the origin of all title to her lands, she could not adjudicate that title, and quiet the possession thereof in case a foreigner claimed it, however unjustly, unless that foreigner submitted voluntarily to her jurisdiction of his case."

²⁹ *Thayer v. Brooks*, 40 Am. Dec. 474.

³⁰ 66 Tex. 568.

| ³¹ 74 Ga. 278.

On this principle, it is provided in England that the writ of summons may be allowed to be served outside the jurisdiction, when "the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, sought to be construed, rectified, set aside, or enforced in the action."⁵² On that ground naturally, if a Court pronounce a judgment affecting land out of its jurisdiction, the Courts of the country where it is situated, and it is presumed also the Courts of any other country, are justified in refusing to be bound by it, or to recognize it.⁵³ This proposition is, in fact, found in most of the Foreign Codes; and the English courts constantly decline jurisdiction in suits relating to realty abroad, although the defendant be within the jurisdiction.⁵⁴ The courts in British India also, have on that account been held not to have jurisdiction over a suit for immovable property situate in the family domains of the Maharajah of Benares.⁵⁵ However if jurisdiction over a suit relating to immovable property is duly acquired, it cannot be ousted if it becomes necessary for its decision, to adjudicate on questions relating to the mortgaged property held by the defendants beyond the jurisdiction, to the extent of it in their possession and to its profits in order to make up the amount of the entire mortgage;⁵⁶ nor need a court refuse to take cognizance of a suit for the partition of lands situate inside the jurisdiction of a court, because there are some other joint lands outside the jurisdiction, which the defendant contends should also be divided.⁵⁷

143. Even when there is no question of title, the English Courts decline to take jurisdiction over actions for trespass to foreign lands. The leading decision on the point is that of *Skinner v. East India Co.*,⁵⁸ in which the Judges reported to the House of Lords, "that the matters touching the taking away of the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon by His Majesty's ordinary courts at Westminster; and as to the dispossessing

English courts do not take cognizance of suits for torts to immovable property in Foreign country.

⁵² 1st Order XI. Rule 1. Sup. Jud. Act.

⁵³ Pig. For. Jud. 130.

⁵⁴ *Buenos Ayres Ry. v. Northern Bu. Ay. Ry.*, 2 Q. B. D. 310.

Graham v. Massey, 23 Ch. D. 743.

⁵⁵ *Raghu Nath Das v. Kakkan Mal*, 1. L. R. III All. 568.

⁵⁶ *Girdhari v. Sheoraj*, 1. L. R. 1 All. 431.

⁵⁷ *Punchannun v. Shib Chunder*, 1. L. R. XIV Cal. 835, per Trevelyan, J.

⁵⁸ 6 State Trials, 710.

him of his house and island, that he was not relievable in any ordinary court of law." Lord Mansfield attempted to abolish the distinction, and held, in two cases *nisi prius*, that an action for trespass to land in foreign country would lie in England, and referring to them pointed out in *Mostyn v. Fabrigas*,³⁹ that the true distinction was between proceedings which are *in rem*, in which the effect of the judgment cannot be had, unless the thing lay within the reach of the court, and proceedings against the person, where damages only are demanded. That suit was for a personal wrong, however, and on the authority of *Skinner's case*, the contrary was held in *Doulson v. Matthews*,^{40bb} which, it has been held, both in England and America, over-ruled the opinion of Lord Mansfield. In *Whittaker v. Forbes*,⁴² an action for arrears of rent-charge for land in Australia was held by the Court of Common Pleas not to lie in England, on the ground that the obligation to pay the rent-charge did not arise from privity of contract, but from privity of estate, and the authorities showed that the venue in such a case was local,⁴³ and the decision was affirmed on appeal.^{bc}

The same distinction is observed in the United States also,⁴⁷ jurisdiction being constantly declined there in suits brought for

bb In this case, Lord Kenyon held, that an action for trespass for entering the plaintiff's dwelling-house at Canada and expelling him therefrom did not lie in England. Erskine moved to set aside the non-suit on the ground that—"this was not an action to recover the land, but merely a personal action to recover damages which was transitory, and might be tried here." Buller, J., said—"It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action *quod re clausura frangit* is local. We try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." In *Phillips v. Eyre*,⁴¹ Willes, J., said: "Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land."

bc Lord Chancellor Cairns, in delivering the judgment, said: "Such an action was a local action to be tried by a jury of the country where the land was situate. The law in this respect is clearly shown in the cases of *Pine v. Countess of Leicester*,⁴⁴ and *Thursby v. Plant*.⁴⁵ Since the statute abolishing real actions, the courts have held that an action of debt will lie for the arrears during the continuance of the rent-charge. The question is whether, with regard to such actions, the same law applies as was laid down in the cases I have referred to with regard to actions of debt after the determination of the rent-charge. I do not think we can depart from a rule of law which has been so long regarded as settled by the authorities to which I have referred and which has never since been departed from. It was suggested by Mr. Willes that, though that might be the law with regard to cases where the land was situated in England, when the land was out of England the same rule would not apply, and the venue would cease to be local. I cannot find any ground for such a proposition either in principle or on authority. The principle of the decisions seems to be, that when the venue is local, the case must be tried by a jury from the place where the venue is laid, and if no such jury can be summoned, the principle would seem equally to show that the case cannot be tried in England at all."

³⁹ 1 Cowp. 161.

⁴⁰ 4 T. R. 503.

⁴¹ 6 Q. B. 28.

⁴² 1 Brock. 203.

⁴³ 10 C. P. 598.

⁴⁴ 1 C. P. D. 51.

⁴⁵ Hob. 37.

⁴⁶ 1 Note. to Wms., Saund. 306
v. Halley, 26 Mod.

trespass to land outside the State.⁴⁸ In *Livingstone v. Jefferson*,⁴⁹ an action for breaking and entering territory in one State, was tried in another State where the defendant was found. Marshall, C. J., said—"If this distinction is established; if judges have determined to carry their innovation on the old rule no further; if, under circumstances which have not changed they have determined this to be the limit of their fiction, for a long course of time, it would require a hardihood which, sitting in this place, I cannot venture on, to pass this limit. This distinction has been repeatedly taken in the books, and is recognized by the best elementary writers, especially by Blackstone, J., from whose authority no man will lightly dissent. He expressly classes an action of trespass on lands with those actions which demand their possession, and which are local, and makes those actions only transitory that are brought on occurrences which might happen anywhere. From the cases that support this distinction, no exception, I believe, is to be found among those that have been decided in court on solemn argument."

In *Companhia de Mocambique v. British South Africa Company*,⁴⁹ Lord Esher, M. R., took the same view, but the decision of the majority of the court was in favor of the existence of the jurisdiction in such cases. Fry, L. J., and Lopes, L. J., whose opinion prevailed, relied mainly on the cases to which Lord Mansfield was a party, and pointed out that the decisions in *Doulson v. Mathews*, and in *Livingstone v. Jefferson*, proceeded merely on the technical difficulty caused by rules of venue, and that on general principles, Marshall, C. J., was in favor of the existence of the jurisdiction. In his decision in the latter case he had said—"It is admitted that, on a contract respecting lands, an action is sustainable wherever the defendant may be found, yet in such a case every difficulty may occur that presents itself in an action of trespass. An investigation of title may become necessary, a question of boundary may arise, and a survey may be essential to the full merits of the cause. Yet these difficulties have not prevailed against the jurisdiction of the Court. They are countervailed, and more than countervailed, by the opposing consideration that, if the action be disallowed, the injured party may have a clear right without a remedy, in a case where a person who has done the wrong, and who ought to make the compensation, is within the power of the Court. That this consideration should lose its influence where the action pursues a thing not in the reach

⁴⁸ *Dodge v. Colby*, 37 Hun. 515.
Man v. Thomson, 80 Hun. 340
 contra, however.

Dexter v. Alfred, 85 St. R. 489.
⁴⁹ (1893) 2 Q. B. 58.

of the Court is of inevitable necessity; but for the loss of its influence where the remedy is against the person, and is within the power of the Court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment.' Fry, L. J., citing that said,—“In entertaining actions for wrong to the person done abroad, the Courts may be called upon to enter upon inquiries with regard to foreign law which may be very difficult, and to express judgment on points in respect of which foreign nations may be highly sensitive. They may have to decide on the law relative to torts; they may have to determine the rights of the ministers of the law, or of the servants of the Crown. They need not then, one would think, be alarmed at having incidentally, and when needful, to ascertain the laws governing immovables in the foreign country. For these reasons I think that the abolition of local venue for the trial for every action has removed the sole formal difficulty which stood in the way of trying an action for trespass to land abroad; that there is now nothing to withdraw this case from the general rule of international law, that the plaintiff shall seek relief in the *forum* of the defendant's residence, and that the Court ought, therefore, to entertain jurisdiction in this case, so far as relates to the claim for damages for trespass to the land in the possession of the plaintiffs.” Lopes, L. J., said—“All actions were originally local, and, whether they concerned movable or immovable property, were only triable in the locality in which they arose. If the cause of action arose abroad, outside the boundary of any country, the Courts here could not entertain it, because no local venue could be assigned to it. With regard to causes of action which might arise anywhere, this was found inconvenient; and the Courts, in order to relieve themselves, made a distinction between transitory matters, which might happen anywhere, and local ones, such as trespass to realty, which could only happen in one particular place. In transitory matters the plaintiff might lay his venue where he pleased, and the defendant was bound to follow it, unless his defence consisted of some matter which in its nature was local. With regard to transitory matters abroad the difficulty was obviated by a fiction. The creation of a fiction however, could not give jurisdiction, unless jurisdiction had existed; but the creation of a fiction could, as it did, remove the fetter imposed by the technical rule of local venue. The rule, however, with regard to local venue in respect to local matters continued down to 1873, when local venues were abolished.

Trespass to land was a local action, and no action in respect to land abroad could be tried in our Courts, before that date. I presume the same fiction might have been adopted with regard to local matters abroad as was adopted with regard to transitory matters abroad, provided the defendant was resident within the jurisdiction and the remedy was *in personam*. It was, however, not thought desirable to extend the fiction to matters local; the local venue with regard to matters local, no doubt, had its advantages—it was convenient that the jurors summoned should have some knowledge of the *locus in quo*, it was convenient for the purpose of a view, and other reasons might be suggested which would account for the retention of the local venue when it had been relaxed in matters transitory. Although the defendant might be within the jurisdiction, and the remedy sought against him have been a remedy *in personam* so long as the local venue existed, it was impossible for the Common Law Courts to entertain actions for trespass to lands abroad. I cannot doubt, however, that there was an inherent, dormant jurisdiction in our Courts, fettered and controlled only by the local venue, to try actions for trespass to lands abroad. The non-requirement of local venue in matters transitory, coupled with the fiction, had liberated the jurisdiction, and enabled our Courts to try matters abroad not subject to local venue, where a suitable remedy could be enforced against the person. Why should not the abolition of local venue have the same operation in matters local when the defendant is within the jurisdiction and the remedy—*viz.*, recovery of damages—is enforceable against his person? Actions for assault and battery would lie, although committed abroad, and this, although the defendant may have justified by pleading a trespass on his land abroad by the plaintiff, and a removal of the plaintiff therefrom on that account. Why not actions for trespass to land abroad, now that the fetter of the local venue is removed? They both sound in damages, and the remedy is enforceable against the person. Why should there be jurisdiction in the one case and not in the other? An action, again, for breach of contract in respect of land abroad would lie against a defendant resident within the jurisdiction, although questions of the most intricate kind might incidentally arise with regard to such land. Courts of Equity, unfettered by local venue, entertained suits affecting lands abroad. They decreed specific performance of articles concerning bound-

aries abroad; they foreclosed mortgages of land abroad; they enforced trusts and relieved against fraud abroad. They seem only to have stayed their hands when they were unable to enforce the suitable remedy. So long as the relief sought was personal, they have unhesitatingly interfered. How can this action of the Courts of Equity be explained, unless they possessed an inherent jurisdiction to entertain such matters, when they had power to enforce their decision against a person within the jurisdiction? In these circumstances, it is difficult to understand why an action for trespass to land will not lie. I believe the true principle to be, now that the fetter of local venue is removed, that the Courts of this realm have jurisdiction to try all causes of action arising abroad when the defendant is within the jurisdiction, and the Courts here can give effect to their jurisdiction by applying the suitable remedy; but that when they cannot apply the suitable remedy—e.g., in ejectment, partition of land, and other such cases—they have no jurisdiction because they are powerless to enforce a remedy. I find no case inconsistent with this view; many authoritative expressions in favor of it.” This decision of Fry, L. J., and Lopes, L. J., has been reversed, however, on appeal by the House of Lords,¹⁹ it being finally settled by their Lordships, that the English Courts have no jurisdiction to entertain an action for trespass to foreign lands. Lord Herschell, L. C., in his judgment in the House of Lords observed with reference to the decisions to which Lord Mansfield was a party, that “it does not appear clear from the language used by Lord Mansfield that he would have regarded a trespass to land committed beyond the seas and outside the king’s dominions as within the cognizance of our Courts”; and added that “the case of *Doulson v. Mathews* has ever since been regarded as law, and I do not think it has been considered as founded merely on the technical difficulty that in this country a local venue was requisite in a local action. . . . The distinction between local and transitory actions depended on the nature of the matters involved and not on the place at which the trial had to take place. It was not called a local action because the venue was local, or a transitory action because the venue might be laid in any county, but the venue was local or transitory, according as the action was local

¹⁹ *British South Africa Co., v. Companhia de Moçambique*, [1893] A

or transitory. . . . I cannot but lay great stress upon the fact that whilst lawyers made an exception from the ordinary rule in the case of a local matter occurring outside the realm for which there was no proper place of trial in this country, and invented a fiction which enabled the courts to exercise jurisdiction, they did not make an exception where the cause of action was a local matter arising abroad, and did not extend the fiction to such cases. The rule that in local actions the venue must be local did not, where the cause of action arose in this country, touch the jurisdiction of the courts, but only determined the particular manner in which the jurisdiction should be exercised; but where the matter complained of was local and arose outside the realm, the refusal to adjudicate upon it was in fact a refusal to exercise jurisdiction, and I cannot think that the courts would have failed to find a remedy if they had regarded the matter as one within their jurisdiction, and which it was proper for them to adjudicate upon. . . . It was admitted in the present case, on behalf of the respondents, that the Court could not make a declaration of title, or grant an injunction to restrain trespasses, the respondents having in relation to these matters abandoned their appeal in the Court below. But it is said that the Court may inquire into the title, and, if the plaintiffs and not the defendants are found to have the better title, may award damages for the trespass committed. I find it difficult to see why this distinction should be drawn. It is said, because the Courts have no power to enforce their judgment by any dealing with the land itself, where it is outside their territorial jurisdiction. But if they can determine the title to it and compel the payment of damages founded upon such determination, why should they not equally proceed *in personam* against a person who, in spite of that determination, insists on disturbing one who has been found by the Court to be the owner of the property? . . . There appear to me, to be solid reasons why the Courts of this country should, in common with those of most other nations, have refused to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication. The inconveniences which might arise from such a course

are obvious, and it is by no means clear to my mind that if the Courts were to exercise jurisdiction in such cases the ends of justice would in the long run, and looking at the matter broadly, be promoted. . . . It is quite true that in the exercise of the undoubted jurisdiction of the Courts it may become necessary incidentally to investigate and determine the title to foreign lands ; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the Courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands. . . . The decisions of the Courts of Equity do not, to my mind, afford any substantial support to the view that the ground upon which the Courts of Common Law abstained from exercising jurisdiction in relation to trespasses to real property abroad was only the technical difficulty of venue. . . . The rule (I of Order XXXVI) does not purport to touch the distinction between local and transitory actions—between matters which have no necessary local connection, and those which are local in their nature. It deals only with the place of trial, and enables actions, whatever their nature, to be tried in any county. But it is, in my opinion, a mere rule of procedure, and applies only to those cases in which the Courts at that time exercised jurisdiction. It has been more than once held that the rules under the Judicature Acts are rules of procedure only, and were not intended to affect, and did not affect, the rights of parties. . . . I have come to the conclusion that the grounds upon which the Courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before.” . . . Lord Halsbury in his judgment said :—“The authority of Lord Mansfield appears to me to prove too much. He appears to have surmounted the difficulty of local venue in a manner which is wholly irreconcilable with the argument so much pressed upon your Lordships, that the absence of precedent in the present action is accounted for throughout all English legal history by the objection that the rule of local venue formed a bar to an action being brought. But it appears to have been omitted to be considered that Lord

Mansfield decided in the plaintiff's favor, and, so far as I can judge from the phrase used by his Lordship, 'which in England would be local actions,' he must have decided upon the ground that inasmuch as the action before himself was for trespass to realty abroad the action would not be limited by the rule of local actions in England. Whether the argument be good or bad, it certainly is not one which sustains the contention that it was the law of local venue which prevented such actions being tried in England."

144. But in England, Courts exercise jurisdiction over contracts made, and equities arising, between persons within jurisdiction, respecting lands in a foreign country. This was held in

Courts take cognizance of suits for personal relief arising out of contracts respecting immovable property situate in foreign country.

Cranston v. Johnston,⁵⁰ in which Arden, M. R., said,—“It was not much litigated, that the Courts of Equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign coun-

try as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here. Those cases," clearly show, that, with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British Dominions, this Court will hold the same jurisdiction, as if they were situated in England. Lord Hardwicke lays down the same doctrine.⁵¹ In *Jackson v. Petrie*,⁵² Lord Chancellor Eldon observed that,—“there is no doubt of the jurisdiction upon contracts as to land in the West Indies, if the persons are here.” In *Norris v. Chambers*,⁵³ Romilly, M. R., said, however that,—“the early cases cited establish that where a plaintiff in England has an equitable money demand against the defendant also residing here, this demand will be enforced by the Court here, not merely against the defendant personally, but if the circumstances of the contract or dealing between the parties justify it, by a declaration of a lien against the real property of the defendant out of the jurisdiction of the Court, and even in some cases by

⁵⁰ 3 Ves.

⁵¹ *Archer v. Preston*, 1 Vern. 75.
⁵² *Muschamp*, 1 Vern.
⁵³ 1 Vern. 419.

⁵⁴ 10 Ves. 164
⁵⁵ 30 L. J. Ch

, 3 Atk.

the appointment of a receiver. . . . There is always this difficulty that the declaration and decree of this Court may be a mere *brutum fulmen*, incapable of being practically enforced against the defendant. Still if the plaintiff is entitled to it, the Court must give him the decree as he asks for it, and then leave him to make it available or not as he can in the foreign country. But in this case the facts either constitute a valid hypothecation of the defendant's mine in Prussia in favor of the plaintiff, or they do not. If they do, it is in Prussia and by the Courts of law of that country that this hypothecation is to be enforced. If they do not, I cannot make a charge upon, or hypothecation of it. In the other cases, the equity between the parties was complete." "The general rules which we have been discussing," says Mr. Pigott,⁵⁵ "are certainly antagonistic to any recognition being accorded to such a judgment by foreign Courts." Lord Selborne, C., in *Orr-Ewing v. Orr-Ewing*,⁵⁶ said—"The Courts of Equity in England are and always have been Courts of conscience operating *in personam* and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicillii* within their jurisdiction."

The question was discussed at length in *re-Hawthorne*,⁵⁷ in which a suit by B, who claimed to be the owner of a house in Saxony against A, who had sold it as his own, to account for the purchase-money was held not to lie in England where they both resided. Kay, J., said:—"I am not aware of any case where a contested claim, depending upon the title to immovables in a foreign country strictly called, being no part of the British Dominions or possessions, has been allowed to be litigated in this country, simply because the plaintiff and defendant happened to be here." Lord Mansfield, in *Mostyn v. Fabrigas*,⁵⁸ distinguished such a case from those in which actions might be brought here. He said—"So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality. The cases cited in the argument were such as the enforcement in England of an equitable mortgage made in England concerning Scotch land, where the Court gave relief, treating the remedy as in the nature of

⁵⁵ Pig. Fr. Jud. 148.
⁵⁶ 9 Ap. Ca. 34.

⁵⁷ *Graham v. Massey*, 23 Ch. D. 743.
⁵⁸ 1 Cowp. 161.

specific performance, when the Court acts *in personam*.⁵⁹ There is no doubt of the jurisdiction in such a case, and the Courts will even foreclose an English mortgage of foreign land;⁶⁰ the foreclosure decree being, as Vice-Chancellor Bacon pointed out in *Paget v. Ede*,⁶¹ merely an extinction of the right to redeem, as was said also by Lord Cranworth in *Colyer v. Finch*.⁶² In *Norris v. Chambres*,⁶³ Lord Romilly distinguished the case of a foreign mortgage of foreign land where no relief by foreclosure would be given by the English Courts. There is a class of cases, in which jurisdiction as to lands in the Colonies has been maintained on the ground of fraud, like *Cranstown v. Johnston*.⁶⁴ Perhaps the decision that goes furthest in the plaintiff's favor is the recent case of *In re Orr Ewing*.⁶⁵ There, a legatee under a Scotch will or trust deed was allowed to maintain an action for administration against the executors who had proved in England, three of whom were in this country and the others had been served in Scotland, without objection. The usual administration order was made though there were no assets in England, but the late Master of Rolls and Lord Justice Cotton, pointed out that the plaintiff's claim was undisputed, and the Master of Rolls repudiated the notion that Scotland was a foreign country for the purpose of such a question of jurisdiction. According to *Ennokin v. Wylie*,⁶⁶ if the claim had been contested and had involved a disputed question of the construction of a Scotch will, it may be doubted if a decree could properly have been made. But the case is infinitely stronger where the contested claim is based upon the right to land, where that land is situate, not in Scotland but in Dresden, where the question whether the plaintiff has any claim or not, must be determined by the law of Saxony as to immovables. In my opinion, the Courts of Civil Judicature in England have no authority to determine in such a case as this whether or not the plaintiff's claim is well founded." Mr. Hawes observes that—"the doctrine of the English Courts of Chancery seems to be carried to the extent that if it has authority to act upon the person of a defendant, it may indirectly act upon his real property situated in a foreign country, and may compel him to give effect to its decree respecting such property, whether it goes to the entire disposition of it, or to

⁵⁹ *Es parte Pollard*, Mont. and Ch. 230.
Toller v. Carteret, 2 Vern. 404.

⁶¹ L. R. 18 Eq. 118.

⁶² 5 H. L. C. 915.

⁶³ 20 Heny 248.

⁶⁴ 3 Ves.

⁶⁵ 9

10 H. L. C. 1.

affect it with liens. The Court not having power to act upon the property, acts upon the conscience of the person living within the jurisdiction. With regard to any contract made, or equity existing between citizens relating to lands situated in a foreign country, particularly in defendant's possession, the Court will exercise the same jurisdiction as if the property were situated in England. A Court of Chancery having jurisdiction over the person, may, by injunction, restrain him from prosecuting suits in the same or a Foreign State, upon a proper case being made, the Court acting upon the clear authority vested in it, to restrain him from doing acts which would work wrong and injury to others, and therefore contrary to equity and good conscience, and not upon any claim of right to interfere with or control the course of proceedings in other tribunals."

The same rule has been recognized and acted upon by the American Courts of Equity also.⁶⁷ Thus it has often been held there that a covenant of seisin being a personal covenant, as to such a covenant, a deed may be reformed by suit brought in the State where the person resides, although the land upon which the deed operates is situate in another State.⁶⁸ But even there, it is admitted that a Foreign Court cannot by its judgment pass the title to land situate in another country, nor bind such land by a judgment that, in default of the defendant's conveying it, it shall be conveyed by deed of its own officers to the plaintiff.⁶⁹ In *Davis v. Headley*,⁷⁰ Chancellor Zabriskie said, that—it was a well-settled principle of law in the decisions of England and of the United States, and acquiesced in by the jurists of all civilized nations, that immovable property is exclusively subject to the laws and jurisdiction of the Court of the State or nation in which it is located, and that no other laws or Courts could affect it, and that he could "find no case in which a statute, judgment, or proceeding in one country has been held to affect such property in another country, or beyond the jurisdiction of the Sovereign or Court making the statute or decree." In *Watkins v. Holman*,⁷¹ McLean, J., in delivering the judgment of the United States Supreme Court said:—"A Court of Chancery,

⁶⁷ *Mason v. Watts*, 6 Cranch, 149.
Mead v. Meritt, 2 Paige, (N. Y.) 49.
Mitchell v. Bunce, 2 Paige, (N. Y.)
⁶⁸ *Bethel v. Bethel*, 92 Ind. 313.
as v. Holman, 16 Pet. 47.

Brown v. Deamond, 130 Mass. 37.
⁶⁹ *Page v. McKee*, 96 Am. Dec. 201.
⁷⁰ 22 N. J. Eq. 115.
⁷¹ 16 Pet. 25.

acting *in personam*, may well decree the conveyance of land in any other State, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." In *Booth v. Clark*,⁷² the same court observed that a receiver, appointed under a creditor's bill, "has no extra-territorial power of official action; none which the Court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property."

In *Farmers' Loan and Trust Co. v. Postal Telegraph Co.*,⁷³ proceedings to foreclose a mortgage of land in the Courts of another State were held to be void; Carpenter, J., saying:—"We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of Court by authority of law in another jurisdiction. The rule seems to be that the Courts of each State have exclusive jurisdiction to settle the title to lands within its own limits." In *Wimer v. Wimer*,⁷⁴ it has been held by Virginia Supreme Court that the Courts of one State have no jurisdiction to decree a partition of land in another State, as "the right to transfer, partition, and change real estate belongs exclusively to the State within whose territory it is situate," and "in order to make a partition, the Court must invade by its officers the soil of another State, and divide up and allot its lands to suit the views of a foreign jurisdiction." Hinton, J., in delivering the judgment of the Court said:—"Such," says Chief Justice Parker, in *Blanchard v. Russell*,⁷⁵ "is the necessary result of the independence of distinct sovereignties, and it is absolutely incompatible with the equality and exclusiveness of the sovereignty of different States or nations that any one nation should be at liberty to exercise dominion over property within the territory of another State. But whilst this is true, it is undoubtedly well settled that in cases of fraud, trust, or contract, Courts of Equity will, whenever jurisdiction over the parties has been acquired, administer full relief, without regard to the nature or situation of the property in which the controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the Court, provided it can be reached by the exer-

⁷² 17 How. 322.
⁷³ 3 Am. St. Rep. 23.

⁷⁴ 3 Am. St. Rep. 136.
⁷⁵ 7 Am. Dec.

cise of its powers over the person, and the relief asked is of such a nature as the Court is capable of administering." *Penn v. Lord Baltimore*; ⁷⁶ *Farley v. Shippen*, ⁷⁷ *Dickinson v. Hoopes*, ⁷⁸ *Barger v. Buckland*, ⁷⁹ *Poindexter v. Burwell*.⁸⁰ But even as to these cases it must be borne in mind that the decrees of the Foreign Court do not directly affect the land, but operate upon the person of the defendant, and compel him to execute the conveyance, and it is the conveyance which has the effect, and not the decree.⁸¹ If, however, the relief asked cannot be administered by a decree *in personam*, without going further and acting upon the land, the court will refuse to entertain the bill. As this court said in a case which has been often quoted: "The distinction is clearly this, that where the decree is to affect the lands directly, as in the case of a suit brought at this court, to divide lands in another State, there the court would not have jurisdiction, because the process could not be effectual. . . . But where the decree is to affect only the persons of the defendant, in order to a complete execution of it, if the plaintiff succeed, . . . it is clearly held to be the settled law of the court that jurisdiction thereof may be entertained."⁸²

In *Lindley v. O'Reilly*,⁸³ Depue J.,—said: "Ever since *Penn v. Lord Baltimore*,⁸⁴ it has been established law that in cases of contract, trust, or fraud, the Equity Courts of one State or country having jurisdiction of the parties are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another State or country. The principle upon which this jurisdiction rests is, that Chancery, acting *in personam*, and not *in rem*, holds the conscience of the parties bound without regard to the *situs* of the property. It is a jurisdiction which arises when a special equity can be shown which forms a ground for compelling a party to convey or release, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief decreed can be obtained through the party's personal obedience. If it went beyond that, the assumption of jurisdiction would not only be presumptuous, but ineffectual. The decree in a suit of this

⁷⁶ 1 Ves. Sr. 444.

⁷⁷ Wythe, 274.

⁷⁸ 6 Gratt. 353.

⁷⁹ 25 Gratt. 602.

⁸⁰ 52 Va. 507.

⁸¹ *Dexter v. Handley*, 22 N. J. Eq. 115.

⁸² *Guerrant v. Fowler*, 1 Hen. and M. 5.

Morr v. Remington, 1 Parsons's Eq. Cas. 347.

⁸³ 7 Am. St. Rep. 602.

aspect imposes a mere personal obligation, enforceable by injunction, attachment, or like process, against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer, or vest a title." Under the provisions of the Civil Procedure Code, however, the Courts in India will not have jurisdiction in regard to any suits for relief respecting immovable property outside British India, held by or on behalf of a defendant resident in British India, even when that relief can be obtained entirely through his personal obedience, and there is no dispute as to the title to that property.

145. Under the fuller and more precise language of Sec. 16 of the Civil Procedure Code, there can hardly be any difference as to the character of the local suits to which the principle of territorial jurisdiction must be held to apply. Even the Bombay High Court has, declining to follow the principle of its decision in *Yenkoba v. Rambhaji*,⁸⁵ held recently in *Vithalrao v. Vaghoji*,⁸⁶ that a suit to recover the amount of a mortgage-debt from the mortgaged property fell within the description of suits enumerated in Sec. 16, and 'can be instituted only in the Court within the local limits of whose jurisdiction the property is situate.' In *Prem Chand v. Mokhoda Debi*,⁸⁷ a decree was passed for the sale of the mortgaged property situate outside the Court's jurisdiction, in case of default of the payment of the mortgage-amount within a certain time, and the judgment-debtor objected to the validity of the sale as being beyond the jurisdiction of the Court. A Full Bench of the Calcutta High Court held the sale to be invalid, Sir Comer Petheram, observing in the judgment of the Full Bench, that—"the Courts in this country have no power to determine any right or interest in immovable property lying wholly outside their local jurisdiction."

A suit to follow the purchase-money of land taken up under the Land Acquisition Act, over which the plaintiff had a mortgage-lien, is not a suit for right to or interest in immovable property."⁸⁸ In *Crisp v. Watson*,⁸⁹ the plaintiff sued in the Court of the Recorder of Rangoon to recover damages for trespass on land in his own possession, and at the same time asked for an injunction for restraining the defendant from fur-

⁸⁵ IX B. H. C. R. 12.
⁸⁶ I. L. R. XVII Bom.
⁸⁷ I. L. R. XVII Cal

⁸⁸ Venkata c. Krishnasami, I L. R. VI Mad.
 344.

I L. R. XX Cal

ther acts of trespass. The land was situate outside the local limits of the Court's jurisdiction, but the Recorder decided in favor of his jurisdiction over the suit on the ground that the relief sought in it could be obtained entirely through the defendant's obedience. The Calcutta High Court, however, reversed that decision, as the plaintiff alleged the property to be in his possession, and it could not, therefore, be considered to be held by the defendant, and Sir William Comer Petheram, in delivering the judgment of the High Court further said, that a claim for damages could not be said "to be a claim which can be entirely obtained through the personal obedience of the defendant, even though it may be joined with a claim for an injunction."

146. The principle applicable to the jurisdiction of suits for or relating to immovable property has been held in some cases to apply to movable property also. In *Carr v. Lewis Coal Co.*,¹⁰ Sherwood, J., said,—“It is needless to say that in order directly to subject particular property to the judgment or decree of any Court, the suit brought for that purpose must be brought where the thing is.” The Indian Civil Procedure Code has recognized that principle only in regard to suits “for the recovery of movable property actually under distraint or attachment,” probably as in that case the *situs* of the movable property is fixed, and cannot be altered by any person at his pleasure. In other cases on account of the ease and frequency with which movable property can be moved from place to place, its *situs* has not been adopted to determine the *forum* of suits relating to that sort of property. “It is a clear proposition” said Lord Loughborough, in one of his most elaborate judgments, “not only of the law of England but of every country in the world where law has the semblance of science, that personal property has no locality.” “The meaning of that is,” as pointed out in Story's Conflict of Laws, “not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. If the law *rei sitæ* were generally to prevail in regard to movables, it would be utterly impossible for the owner in many cases to know in what manner to dispose of them during his life, or to distribute them at his death, not only from the uncertainty of their situation in the transit to and

from different places, but from the impracticability of knowing the law of transfer *inter vivos*, or of testamentary dispositions and successions in the different countries in which they might happen to be." Quoting this with approval in *Companhia de Mocambique v. British South Africa Company*,⁹¹ Lord Esher, M. R., said—"These are the reasons for the general consent as to personal property that it follows the person, and it is the general consent which gives the general jurisdiction." Jurisdiction over non-resident foreigners is generally deemed to exist in regard to the movable property within jurisdiction. In *Quarl v. Abbett*,⁹² the Indiana Supreme Court said:—"It is a general principle that the process of the Courts may reach and seize property within its jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. 'If a foreigner or citizen of another State,' says an able Court, 'send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects it has the right to regulate.'" This jurisdiction in fact appears to be hardly ever disputed, and several cases in support of it will be cited in Sec. 160. The jurisdiction used to be assumed in England also, and has never been repudiated, though the Rules framed under the Supreme Judicature Act do not expressly provide for the service of the writ of a summons outside the jurisdiction, except when the claim is for stock or other personal property, and allow it to be so served outside the jurisdiction only, if "the action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the doctrine of the law of England."

147. In transitory suits the jurisdiction has, as observed above, been assigned, generally speaking to the Courts of the place where the cause of action should have arisen or the defendant should be residing. The exact signification of the expression *cause of action* in cases of contract in

⁹¹ (1899) 9 Q. B. 307.

⁹² 53 Am. Rep. 603.

⁹³ *Fede v. Clark v. Tarbell*, 55 N. H. 85.

Ames Iron Works v. Warren, 76 Ind. 512.

Green v. Banker, 7 Wall. 139.

Rice v. Curtis, 52 Vt. 400.

connection with questions of jurisdiction need not be discussed here, as the Explanation introduced in 1888, has expressly declared it to include the making of the contract as well as its breach. The explanation as well as the rule, constituting merely the Municipal law of British India, refers only to the jurisdiction possessed by the Courts in British India. They can have no application to suits not cognizable by all and each of the said Courts on account of the general principles of International Law. The entire rule will thus be construed subject to those principles, which must be explained here briefly, especially as the Courts of other countries do not treat as valid judgments passed by a Court having jurisdiction only with reference to the particular law of British India.

As to suits on torts, it is generally agreed upon that they may be brought at the wrong-doer's domicile or at the place where the tort is committed. The latter *forum* was known among Romans as *forum delictæ*, and even Savigny admits that it arises from the commission of the delict itself, even at an accidental and temporary residence, that no other extrinsic circumstances were necessary for it, and that it did not arise by a presumptive voluntary jurisdiction.⁹¹ There is a general unanimity also as to the existence for suits on contracts, of a *forum contractus*, which was recognized even by the Romans as an alternative for *forum domicilii*.

148. Unfortunately jurists are not agreed as to what *forum contractus* was. On the authority of a text of Ulpian and of certain other texts, *forum contractus* was held to be identical with the place where the contract was entered into and executed. This view was adopted by a number of jurists, and acted upon in several countries. It was dissented from also by some jurists, and by none with greater force than by Savigny, who contended for another construction of Ulpian's text. He speaks of the place of the origin of the obligation as "accidental, transitory, foreign to the substance of the obligation and to its further development and efficacy;" and contends that the place of the fulfilment of the obligation is its essence, that it is always determined by the direct intention of the parties, that it is always the place of fulfilment that determines the jurisdiction, either that expressly fixed or that which

Conflict of opinion as to *forum contractus*.

depends on a tacit expectation; and that in both these cases a voluntary submission of the defendant to this jurisdiction is assumed, unless an express declaration to the contrary excludes it.⁹⁵ The controversy as to the construction of Ulpian's text is not of practical importance now, because, as pointed out by Mr. Justice Markby in *Gopee Kisto Gossamee v. Nilcomul*,⁹⁶ "Even in countries which have avowedly adopted the Roman Law as the basis of their system, the principle is firmly established that a contract may generally be enforced at the place where it was entered into. This is the law of Prussia, of Bavaria, of Hanover, and, I believe, of other German States. . . . The law of Italy is precisely to the same effect. Even in France where jurisdiction has been made to depend chiefly on domicile, the exception is allowed that, in matters of commerce, the suit may be brought where the promise is made, and the goods are delivered, although this may not be the place where the money is to be paid. The English law on the question of jurisdiction in cases of contract is the very reverse of the French, allowing a defendant to be sued anywhere, if he can only be brought into Court."

Under the Common Law Procedure Act 1852, the writ for the defendant in a suit on a contract could be served out of the jurisdiction "either where the cause of action arose within the jurisdiction, or where the cause of action was in respect of the breach of a contract made within the jurisdiction." The Courts could not agree as to the exact signification of the expression 'cause of action.' The Court of Exchequer held in *Sichel v. Borch*,⁹⁷ that the cause of action meant the whole cause, and that the English Courts would have no jurisdiction where the contract was made abroad, and the breach occurred in England. The Queen's Bench took a similar view in *Allhusen v. Margarejo*,⁹⁸ but the Court of Common Pleas in *Jackson v. Spittall*,⁹⁹ held the contrary on the ground that the cause of action referred only to the act which gives the plaintiff his cause of complaint; and in *Vaughan v. Weldon*,¹⁰⁰ on a concurrence of all the Judges, the latter view was adopted as the correct law. The same view has since been adopted by the English Legislature, and Order XI, Rule 1, framed under the Supreme Judicature Act, provides that the writ of summons may be permitted to be served outside the

⁹⁵ GUTH SAV. 17. IN LAW, 120 210.
⁹⁶ XIII R. L. R. 45.
⁹⁷ 20 L. J. Arch. 179.

⁹⁸ L. R. 1 Q. B. 340.
⁹⁹ L. R. 5 C. P. 342.
¹⁰⁰ L. R. 10 C. P. 47.

jurisdiction, when "the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof," ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland. It has been repeatedly held with reference to this very rule also, that it cannot be said of any contract that may be performed outside England also, that it ought to be performed in England. In *Bell v. Antwerp London and Brazil Line*,¹ Lord Esher, M. R., said :—"Where a contract is one which may be performed in or out of the jurisdiction, as the case may be, I do not see how it can be a contract which, according to its terms, ought to be performed within any more than without the jurisdiction." This observation was cited with approval and followed in *The Eider*.² Lord Justice Lindley further observed as to the rule in *Rein v. Stein*,³ that it is not "the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction."

In this country also, the place of the mere entering into an obligation was not generally considered sufficient to give jurisdiction. Mr. Justice Holloway in delivering the judgment of the Madras High Court in *Mathappa Chetti v. Chellappa Chetti*,⁴ said—"Despite numberless exceptions which really destroy the rule, it is still thought that the general rule is wherever a contract is executed there is a competent *forum*."

^c The expression 'according to the terms thereof' received a rather liberal interpretation in *Reynolds v. Coleman*,⁵ Lord Justice Cotton, observing that—"those words mean that you must look at the time when the contract was made, and then determine whether, having regard to the terms the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction. In *Brazil v. Antwerp, London and Brazil Line*, Lord Justice Kay, incidentally observed that,—"the expression would, *prima facie*, mean according to the written terms; but in *Reynolds v. Coleman*, Cotton, L. J., pointed out, and I entirely agree with him, that in construing any contract regard must be had not only to the words of it, but also to the surrounding circumstances under which it was made, and it is possible that, though it may not be stated in terms where the contract is to be performed, yet from the words, taken in connection with the surrounding circumstances as strong an indication may be formed as to the place where it is to be performed as if it had been stated in express terms." In *Rein v. Stein*, Lord Justice Kay looked to the circumstances existing at the time of the contract, to ascertain where the contract was to be performed, though he observed that only those circumstances could be looked to. In *The Eider*, Lord Justice Lindley, after referring to the above decisions said, that the expression "means more than according to the actual words. We must look to the contract, to the parties to it and to the circumstances in which it was entered into."

¹ Q. B. 106.
P. 119.
² Q. B. 762.

³ L. L. R. 1
⁴ 25 Ob. D. 653

The doctrine of Bar, following Molinœus and Thol, that the domicile of the debtor (in its wide sense) is generally to give the law of the obligation seems best founded both on the nature of the relation and on convenience. The place of arising of the obligation must be abandoned, as if not, two subjects by resorting to a foreign country could evade the law of their own country, and a contract made on a journey would subject the makers to a law which probably neither of them knows. Savigny's assault upon this rule is quite decisive. His own rule, the place of fulfilment, although very often giving the true solution, cannot be treated as a principle. 'The true doctrine is that the law should be that of the debtor (in the wider sense). There may, however, be a *forum* at a place other than the seat of the local law by the second rule which governs jurisdiction, 'To Courts of the State according to whose laws an obligatory contract is to be determined in so far as the debtor personally resides therein, or possesses an appreciable amount of property therein as to all claims out of that obligation.' Residence, as the passage of Ulpian shows, does not mean a casual passage through, or a momentary presence in a State, but something much more permanent, although not sufficient to amount to *domicilium*. In *Schibsby v. Westenholz*, Blackburn, J., said 'that the question had not been determined whether the English Court would hold that the French Court had jurisdiction if the contract had been executed within its local limits, but expressed an opinion that it probably would. It is manifest that the great Roman lawyer and all foreign jurists would hold the contrary, and as it seems to us on the soundest principles. There is no ground or principle that a fact so absolutely unimportant should vest a Court with jurisdiction over a man, because in consequence of the widespread relations of commerce he contracts within its jurisdiction an obligation which he can only fulfil at the place of his domicile.' In *Bikrama Singh v. Bir Singh*,⁷ the suit was brought on a judgment of a Court of Faridkote State, and the defendant was not a subject of that State; he resided there for some years as an officer in the service of the State, but had quitted the State some years before the commencement of the suit and had not returned, and did not intend to return to the State. His service in the State involved the receipt and custody of monies of the State, to be accounted for by him to the State, and the

original action brought against him was brought to recover monies alleged not to have been duly accounted for, and to have been misappropriated by him in the State during his service. Plowden, J., said—"It appears to be an open question under the English law whether, under the circumstances stated, a Foreign Court would have jurisdiction. It is certain that whenever a question arises of enforcing the obligations arising out of a contract, the law to be applied is the *lex loci contractus*, and this furnishes a strong argument in favor of the binding effect of the judgment of a tribunal *loci contractus* over an absent foreigner who had contracted while resident in the country where such tribunal is situate. A State assuming to exercise jurisdiction over an absent foreigner in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or the principles of International Law, so that its judgment should not be binding merely on the ground of the absence of the defendant. He (the defendant) relies upon decisions at VIII M. H. C., page 14; I. L. R., II Madras, page 400, and page 407. None of these cases is in point. The case at I. L. R., I Madras, page 197, is more in his favor, though not quite in point. The point in that case was whether the execution of a Bill in a foreign State where the debtor was neither domiciled, resident, nor possessed property gave jurisdiction to the Foreign Court in an action on the bill. The Court held that it did not. The case is distinguishable from the present in which, according to the view above taken, the obligation was not only contracted, but was to be fulfilled in the Faridkot State. *In the Madras case*, 'the defendant had only contracted within the jurisdiction an obligation which he can only fulfil at the place of his domicile.' I may mention here that in this case and the two cases in I. L. R., II Madras, the soundness of the principles enunciated by Lord Blackburn in *Godard v. Gray*, and *Schibsby v. Westenholz*, was recognized and affirmed."

149. *Forum Domicilii* was the primary *Forum* for all transitory suits, and it retains its importance unimpaired even now for the determination of jurisdiction as between different countries. In the municipal law of British India, *dwelling* took its place, and now mere

Signification of the words to dwell and to reside.

residence often determines the jurisdiction of Courts. There has been a great conflict of opinion as to the exact character of the defendant's *dwelling* and *residence* required to confer jurisdiction on the Courts under the Presidency High Court's Charters and the Civil Procedure Code. Residence was taken by Parke, B., in *Lamb v. Smith*,¹⁵ to mean 'a domicile or home.' "In legal phraseology," said Bradley, J., in *DeMeli v. DeMeli*,¹¹ "residence is synonymous with inhabitancy or domicile." The same view of the signification of the word has been taken in *Langdon v. Doud*,¹⁵ and in *People v. Platt*.¹⁶ The word *residence* is also often used and understood as synonymous with *dwelling*, which itself is a word that admits of a variety of significations, and that was used to mark off jurisdiction not only in the County Court Acts in England, but also in the Civil Procedure Code of 1859, the Mofussil Small Cause Court Act of 1865, the Presidency Small Cause Court Act and other enactments. Even Spankie and Oldfield, JJ., observed in *Fatima v. Sakina*,¹⁷ that the word "dwelling or residence are synonymous with domicile or home, and mean that place where a person has his fixed permanent home, to which, whenever he is absent, he has the intention of returning." In *Mahomed Shuffli v. Laldin*,¹⁸ Sir Charles Sargent, said, that the words *dwell* and *reside* appeared to express the same idea; and that neither expression implied a permanent state of things. This was cited with approval in *Goswami v. Govardhanlal*,¹⁹ in which Farran, J., said—"To dwell is to reside. The decisions which have been arrived at in affixing a meaning to the one word would be a safe guide in determining the meaning to be attached to the other." As to the usual signification of the word *dwelling*, the result of the decisions appears to be that wheresoever and for howsoever long a period a man may reside, he will be considered to dwell where his family or servants reside, provided he has even an indefinitely remote intention of returning there, and that such intention, in the absence of special circumstances, will be presumed.²⁰ The last two cases cited are also an authority for the proposition that a man may have more than one dwelling at the same time, as where his wives or servants occupy both the houses, he himself

¹⁵ 10 L. J. 81¹⁶ 17 Am. R.¹⁷ 83 Am.¹⁸ 117 N. Y.¹⁹ 1 L. R. 1 A. 2²⁰ 1 L. R. 111 Rom. 237²⁰ 1 L. R. 214 Rom. 547

Chunder c. Kurnoodhar, VII W. R. 349.

Gunda Mull c. Mulla Mull, VI P. R. 38.

c. Gunga Ram, VI I

Narainjan Das c. Ram Kishan, XIV P. R.

Cr.

Ordo c. Skinner, L. R. VII I. A., 197

occupying sometimes the one and sometimes the other, and having during his period of absence from each house an intention of returning there. The same appears to have been held in *Goswami v. Govardhanlal*,²¹ and was taken as settled in a number of cases by the English Courts.²²

It was generally agreed upon, however, even under the Civil Procedure Code of 1859, that while a man has a permanent *dwelling* at a place, he cannot be held to dwell at a place where he has lodged for a temporary purpose.²³ Thus in *Emritoll v. Kidd*,²⁴ a person having a permanent *residence* at Dinapore, went to Calcutta and resided there temporarily for the purpose of carrying on a suit, and he was held not to dwell at Calcutta; it being observed by the High Court, that the Charter was only meant to give jurisdiction where it attaches on the score of residence, when that residence is substantially the ordinary residence or dwelling of the defendant. In *Madho Doss v. Sita Ram*,²⁵ it was held that, to dwell in a place was to have one's permanent abode there. In *Kissun Sing v. Sturt*,²⁶ the defendant was an officer attached to a Regiment stationed at Vellore, and without keeping any house there he went on medical leave to Madras and resided there in a house he took on rent; and Holloway and Innes, J.J., said that the temporary character of the defendant's absence from the headquarters of his regiment and *animus revertendi* shown by the actual return thither, were very cogent evidence from which the Judge might conclude that to be the place at which the defendant dwelt. In *Saminatha v. Varisai Mahomed*,²⁷ a person who resided at Coimbatore, but had cultivation within the jurisdiction of the Court at Ootacamund and who came there to answer another demand against him was held not to dwell there. Scotland, C. J., and Holloway, J., said that "in *Kerr v. Haynes*,²⁸ a person who had a place of business in London and resorted to it, sometimes twice sometimes four times a week, but whose family and servants and fixed residence were at Margate, was held to dwell at Margate and not in London. There are many other cases, which are all collected in *Adams v. G. West. R. Co.*,²⁹ and which show that mere casual presence or even residence for a temporary purpose within the jurisdiction, without the intention of remaining is not *dwelling* within the

²¹ 1. L. R., XIV Bom. 541.

²² Breull, 16 Ch. D. 447.

Barley v. Bryant, 1 Ell. and Bl. 340.

Butler v. Ablowhite, 6 C. B., N. S. 740.

R. v. Murray, 2 East P. C. 408.

²³ *Zalem v. Gobindgar*, 11. J., O. S. 86.

²⁴ 11 Hydr. 116.

²⁵ 111 All. H. C. B. 121.

²⁶ 5 M. H. C. B. 471.

²⁷ 11 M. H. C. B. 304.

²⁸ 20 L. J. Q. B. 70.

²⁹ 6 Hurl. and N. 404.

meaning of the Small Cause Court Act.”^d In *Kanasji Framji v. Wallace*,⁵⁰ an Officer in the Bombay Staff Corps, holding an appointment in Scinde, and residing at Sakkar, came to Bombay for a few days, and stayed there for about ten days in a friend’s house, and Arnould, J., held that he could not be said to dwell in Bombay. In *Gosvami v. Govardhanlal*,⁵¹ Farran, J., said,—“There is, so far as I am aware, no decision of the Courts in India which supports the contention of Mr. Inverarity, that staying in a place with a definite object or fixed purpose (in the case of a man who has a *bonâ-fide* and permanent abode elsewhere) for a short and limited period constitutes a dwelling in such place within the meaning of the Letters Patent. The decisions, so far as they go, rather lead to the opposite conclusion. He relies, however, upon English authorities more or less analogous. . . . I have referred to all the cases cited before me, and also to the cases of *Marsh v. Conquest*,⁵² *Macdougall v. Paterson*⁵³ and *Kerr v. Haynes*,⁵⁴ and am unable to see that the meaning of the word to ‘reside’ or ‘dwell’ has been, in the case of an Act conferring limited jurisdiction, construed in such a manner as to support the argument of Mr. Inverarity. Upon the wording of the clause, and the Indian authorities, and on those I have lastly referred to decided in the English Courts, I have come to the conclusion that the residence contemplated by the Letters Patent must be of a more or less permanent character, of such a nature as to show that the High Court, in which a defendant is sued, is his natural *forum*.” The English cases generally support the doctrine, that a person cannot be said to dwell where he always does his business and entertains his friends, nor even where he has a house and sleeps occasionally,⁵⁵ and in *Kerr v.*

⁵¹ he was held not to dwell even at a place where he as slept even for three or four nights a week.

When a dwelling is abandoned however without an *animus revertendi* it ceases to be the dwelling, even though no new one be established⁵⁶: and where a man has no dwelling of a

^d The cases said to be collected were only referred to in the argument. What held in the case itself was, that “the word ‘dwell’ when applied to a Corporation, means something analogous to what it means when applied to an individual, *viz.* a dwelling at some fixed known place, not on the whole line of the Railway, but where its principal business is carried on.” Baron Wilde, further said,—“The home of a Company must be taken to be that place which is occupied as such,—where their profits come home to them, whence orders emanate, and where the chief officers of the Company are to be found.”

1 B. H. C. R. 113.
1 L. R., XIV Bom. 3
17 C. B., N. S. 412

29 L. J. Q. B. 70.
R. v. Martin, R. and R. 106.
R. v. The Duke of Richmond, VI T. R. 1
P. C.

permanent character, he must be held to dwell where he happens to be lodged for the time even as a guest or a relation.³⁷ Thus, where a person had usually a house at Mussoorie from March to October where he left his wife and children, while he attended race-meetings in the plains, and visited Calcutta in March, merely temporarily and for the purpose of pleasure, he was held liable to answer a suit filed against him during his stay in Calcutta³⁸ because he could not be said to dwell at Mussoorie, as he never lived there during the winter months, and though he kept an establishment there for his children, yet at the time the suit was instituted he had no house of his own. So also a person spending his time alternately in the Mofussil and Calcutta, and residing at the latter place for some days previous to and on the day of filing the plaint, was held to dwell in Calcutta, for the purposes of jurisdiction as to that suit.³⁹ So also where an officer attached to a regiment at Shahjehanpur, who had been gazetted to two years' furlough, was served with a process while attending a race-meeting at Meerut, it was held that if he had not availed himself of furlough, but was only present on leave at Meerut, or having availed himself of furlough he retained his permanent residence at Shahjehanpur, and visited Meerut only for a few days, he could not be said to dwell at Meerut; but that if having availed himself of furlough, and having retained no permanent place of residence at Shahjehanpur or elsewhere, he attended the race-meetings with the intention of leaving after the races, he must be held to have dwelt at Meerut.⁴⁰ So also in *Everet v. Frere*,⁴¹ the defendant having taken leave from Burma was on his way to England staying for a few days at Madras, and the question was whether he could be held to reside there within the meaning of Sec. 648, Civil Procedure Code, and Brandt, J., said—"There is nothing to show that the defendant has at the present moment any permanent residence, and I must hold that for the purpose of this application he is at present 'residing' within the limits of the ordinary Civil Jurisdiction of this Court."

The word 'dwell' has been understood to denote mere temporary residence also in some cases, in illustration of which reference may be made to those of *Porgash Paray v. Hachim*,⁴² and *Gendu v. Gorind*.⁴³ "The defendant," said Jackson, J., in

³⁷ *Everet v. Frere*, L. R. 1 Ex. 113.
³⁸ *Morris v. Baumgarten*, Bourke, 126.
³⁹ *Chilly Kristo*

All. H. C. R. 25.

⁴³ X B. H. C. 409.

the former case, "is employed as a domestic servant at Monghyr, from which place he is not shown to have any immediate or early intention of returning, though his family reside at his permanent home in the Kishuaghur jurisdiction. I think the word 'dwell' must be used in the strict sense of actual residence, and that the defendant in this case really dwells for the time being in Monghyr. The place where he is in service of the nature described cannot be looked upon, I think, as a 'lodging for a temporary purpose only,' but is, in reality, the place where the defendant is dwelling, although he may have the intention of returning, at some future time, to another dwelling where his family are now residing." In the latter case, the defendant being in service at a certain place was held not to dwell at another place where he had a family house in which his father lived and which he occasionally visited. The word 'dwell' was held to have the same meaning by J. Smyth, J., in his dissentient judgment in *Narinjan Das v. Ram Kishen*.⁴⁴

As to the word 'reside,' Sir C. Sargent, C. J., said in *Mahomed Shuffli v. Laldin*,⁴⁵ "That the word 'residence' may receive a larger or more restricted meaning according to what the Court believes the intention of the Legislature to have been in framing the particular provision in which the word is used." Similarly, James, L. J., said in *ex parte Breull*⁴⁶ that the term residence "has no actual definite technical meaning, but you may construe it in every case in accordance with the object and intent of the Act in which it occurs." And this proposition has been re-affirmed and approved in several cases.⁴⁷ It is on this ground that a peculiar signifi-

c. The American Courts also construe the word 'residence' variously with a regard to the context. Thus in *DeMeli v. DeMeli*,⁴⁸ the question was as to its signification for the purpose of a rule giving jurisdiction over suits by wife for separation to the Courts of a State where the parties should be residents. "It was urged that although the continued purpose of the defendant, while absent from it, may have been to return to this State, he was, nevertheless, a resident of Dresden, and not of the State of New York, and that his place of residence was not determined by his domicile. That is so for some purposes; and in cases where it is applicable, a change of the latter is not essential to the change of the former. The question here has relation to the legal residence of the parties. And within the meaning of the statute providing for actions of this character, the place of which the parties are residents is that of their permanent abode which may be distinguished from their place of temporary residence. . . . The purposes for which residence is not determined by domicile are those within the contemplation of some statutes. Such application has been made of statutes providing for levy of attachments on the property of non-residents, and the assessment of taxes on the personal property of residents. Then, and for the purpose of such remedy and taxation, the place where the party actually resides may, as has been held, be treated as that of his residence, although his domicile is elsewhere."

⁴⁴ XIV P. R. Cr. 85.

⁴⁵ I. L. R. III Bom. 237.

⁴⁶ 16

Everet v. Frere, I. L. R. VIII Mad.

v. Govardhanlal, I. L. R. XIV Bom.

549.

⁴⁷ 17 Am. St. Rep

I. L. R. VI Bom. 100

tion is generally attached to the word residence as used in the Insolvent Act. Thus in *re Howard Brothers*,⁴⁹ Pontifex, J., said—"That the word 'reside' in Sec. 5 of the Insolvent Act, when applicable to the insolvency of traders, includes an occupation for the purpose of trading, whether or not accompanied by sleeping or dwelling." In *Hurruck Chund*,⁵⁰ Broughton, J., referring to the residence required by Sec. 5 of the Insolvent Act, said—"It has been held more than once, and very recently held, that residence within the meaning of this section may mean carrying on business in Calcutta, although at the time not actually dwelling within the limits of Calcutta." In *Ram Paul*,⁵¹ the petitioner went to Calcutta in May and stayed there till the middle of September when the Court rose, and did not return until just before the Court re-opened, but the residence at Calcutta was held not sufficient to give jurisdiction within the meaning of Sec. 5 of the Insolvent Act.

The idea involved in the words 'reside' and 'residence' as generally used and understood is of a much less permanent character; and while the residence of one's family in a certain place, and his intention to return there, cannot make him a 'resident' of that place, a man must be held to reside, where he himself is ordinarily lodged, even though his family should reside at another place, where he should have an intention of eventually returning; it is clear, however, as observed by Plowden, J., in *Narinjan Das v. Ram Kishen*,⁵² that actual residence does not require a continuous actual presence every day and every hour, in the place of residence, or exclude temporary absence from the locality in which it lies. On the same principle, the Calcutta High Court in *Modhu Soodun v. Cochrane*,⁵³ said, that even if the defendant "did go and reside, occasionally, in his house at Bhundurbatti, but that he habitually and ordinarily for all purposes resides in Calcutta, that is to be held his residence, under that section, and not his house at Bhundurbatti in which he might be interested as owner." The distinction between the words 'dwell' and 'reside' was well explained in *Emrit Lall v. Kidd*,⁵⁴ by Levinge, J., who said "I consider, that the word 'dwell' has a more extended signification than the word 'reside,' and means a permanent as opposed to a mere temporary residence. A traveller putting up at an hotel may be said, in one sense, to reside there, but

⁴⁹ XI B L R 354
⁵⁰ I L R V Cal. 605.
⁵¹ VIII C L R 14

⁵² XIV P B Cr 91.
⁵³ VI C L R 417
⁵⁴ I.

a man can only be said to 'dwell' in the sense in which that term is used as giving jurisdiction in the place where he ordinarily and permanently resides.' This difference in the signification of the two terms appears to be borne out by the language of the first Explanation attached to Sec. 17 of the Civil Procedure Code, which provides that, "where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging." It is thus evident that the word 'reside' should be understood in the law relating to jurisdiction as used in its strictest sense, and it is in all probability, on account of it that it is used for *dwell* in the Civil Procedure Code. In *Goswami v. Govardhan*,⁵⁵ Farran, J., said :—"When we wish to speak of residence for a limited time, we apply a limiting adjective. In Sec. 17 the term 'residence' is, by Explanation I., applied to the temporary lodging of a defendant in respect of a cause of action arising at the place where he has such temporary lodging. That is an enlarging explanation for a limited purpose, and not an interpretation or definition of the word as usually understood." This observation was a mere *obiter dictum*, however, as the question in the case was in regard to the signification of the word 'dwelling' only; and there is nothing whatever to support the view expressed in regard to Explanation I., which appears to have been introduced simply to negative the decision in *Macdougall v. Paterson*,⁵⁶ Jervis, C. J., having observed in the judgment of the Court in that case, that "where a party has a permanent place of dwelling, we do not think that he dwells, in the sense of that word as used in the Statute (Sec. 128, Statute 9 and 10 Vict. Cap. 95) at a place where he has lodgings for a temporary purpose only."

150. It is difficult to lay down how many days a man must stay in any place and in what way, so as to be said to 'reside' there. Whatever may be the exact sense of the words 'residence' and 'resident,' the word 'reside' appears to imply a stay of even a less permanent character than that connoted by those terms; but on the other hand, it may be laid down as certain that when a man goes to any particular place

Defendant's voluntary residence at the time of the institution of the suit is sufficient to confer jurisdiction.

with a definite object and for a definite purpose, which he expects to finish within a short definite time, intending and expecting to leave that place as soon as that object and that purpose are accomplished, he cannot be said to reside there. Thus, where a man went from Cawnpur, where he had resided for some time and left his wife, to file his petition of insolvency in the Calcutta High Court, which he did after staying there for eight days in an hotel, alleging that he intended to reside there, it was held that he could not be said to reside in Calcutta.⁵⁷ The same was held by the Punjab Chief Court in *Parker v. The Simla Bank Corporation*⁵⁸ and in England in *ex parte Hains re Bianconi*.⁵⁹ There was no doubt some confusion in these cases between the words 'to dwell' and 'to reside,' but the latter is the word most frequently used in the judgments.

It has been held, however, that the residence at the time of the institution of the suit will be sufficient to confer jurisdiction, even though it may have commenced only a day before,⁶⁰ and for that very purpose, provided the residence is actual and *bonâ fide*, and not merely colorable or collusive and therefore no residence at all.⁶¹ Nor is the summons required to be served on the defendant personally in any case, as Secs. 82 and 83 broadly lay down that when the summons cannot for any reason be served in the ordinary way, it may be ordered to be served in such other manner as the Court thinks fit; this substituted service being as effectual as the service personally on the defendant. It is not considered necessary even that a non-resident plaintiff should be within the jurisdiction of a Court in order to maintain an action therein, and Mr. Hawes says,⁶² that "an absent foreigner may maintain an action in the Courts of a State against a non-resident alien, if the latter be personally served with process within the territorial limits of the Court."

A person in the employ of a Foreign Government staying under the orders of the British Government at a particular place in British India, was held to reside there, and to be subject to the jurisdiction of the Courts even in respect of debts incurred by him in his own foreign country.⁶³ Even a prisoner has been held to reside at a place where he is lawfully

⁵⁷ 1 B. L. R. 54.

⁵⁸ 1976 P. R. No. 34.

⁵⁹ 9 L. T. N. S. 847.

⁶⁰ *Madoo v. Bulloo*, Mor. 149.

⁶¹ *Massey v. Burton*, 27 L. J. Ex. 101.

⁶² *Hawes, Jur.* 87.

⁶³ *Dwarkan Das v. Jhoolal*, I. S. D. A. (Cal. Hl. Rep. 410.

confined.⁶⁴ The word 'voluntarily,' appears to have been used to avoid such a construction, as usually a person's compulsory residence at any place is not considered sufficient to give jurisdiction to the Courts of that place over him.⁶⁵

151. The other circumstance giving jurisdiction in transitory suits to a Court is, as observed above, the carrying of the defendant's carrying on business or personally working for gain within the local limits of the Court's jurisdiction. There has been some conflict of opinion as to the character of the business that is contemplated by the rule. This conflict has been especially marked as to whether the business of carrying on the Government is such a business and whether it can be held to give jurisdiction over a suit against the Secretary of State for India to a Court which otherwise does not possess it. In *Ganesh Das v. Secretary of State for India*,⁶⁶ it was held that the defendant Secretary of State could not be said to carry on business at Rawalpindi. It was not necessary for the decision of the case to express any opinion as to whether he could be said to carry on business at the seat of each of the Local Governments in India. Even that was denied, however, in *Rundle v. The Secretary of State*,⁶⁷ in which it was held that the carrying on of the business of the Government could not be considered to be carrying on of business within the meaning of the 12th clause of the Letters Patent. Wells, J., observed in the case that—"the words carry on business and personally work for gain do not refer to an institution like the Government of India." This observation was considered a mere *obiter dictum* in *Bipradas Dey v. Secretary of State for India in Council*,⁶⁸ in which Pigot, J., held that the Secretary of State was rightly sued at Calcutta, the capital and chief seat of the Government of India, and said:—"I own that it seems to me very difficult if the Secretary of State be, in this country, a legal person, in any sense, to hold that he does not carry on business in Calcutta. He enters into contracts, as for instance, in the conduct of the opium business of the Government, institutes suits in respect of breaches of such contracts, and appears as a judgment-creditor in this Court and in the Insolvent Court. The State Railways are held and their affairs conducted in his name, and some of them have

⁶⁴ Caliprasaud v. Frankissen, Mor 165.
 Innton v. Paterson, 3 C. B. N. S. 207.
 See also, XIV. P. R. Cr. 92.

⁶⁶ XVI P. R. 254.
⁶⁷ 1 Hyde, 37.
⁶⁸ I L. R. XIV C

their chief places of business here. . . . If it be the law that the Government (or now the Secretary of State) can only be sued in the High Courts, if all or, with leave granted, part of the cause of action arose within the local limits, then the following cases were gone into and decided without jurisdiction. *Ross Johnson v. Secretary of State*,⁶⁹ dismissed, no doubt, on the merits, but entertained without jurisdiction if *Rundle's case* is conclusive; *The P. and O. S. N. Company v. Secretary of State*,⁷⁰ decided by Peacock, C. J., Jackson, J., and Wells, J. In that case, as was admitted in argument in the present, the cause of action arose outside the local limits. That no doubt was a case from the Small Cause Court, *Brito v. Secretary of State*,⁷¹ before the present Chief Justice Sargent, in which case the cause of action arose outside Bombay. *Hari Bhanji v. Secretary of State*,⁷² in which case the cause of action arose outside the jurisdiction, and *Rundle's case* was cited." Pigot, J., further expressed his concurrence with the view laid down by Sir Colley Scotland, C. J., in *Subbaraya Mudali v. the Government*,⁷³ in which the learned Chief Justice said:— "As regards the Government, assuming the Local Government to be meant, we are of opinion that the Government must be considered as carrying on its business at the place where the members of the governing body meet and deliberate upon the affairs of Government, and as such, decide upon and issue their authoritative orders. Under the Charter of the late Supreme Court, suits against Government were instituted against the East India Company, and, since the passing of the 21 and 22 Vic. c. 106, against the Secretary of State in Council. But in the Civil Procedure Code, by which the procedure in the High Court is now governed, suits against the Government are provided for, and no distinction is pointed out, between the Supreme Government at Calcutta or the Secretary of State in Council, and the Government of each Presidency. But having referred to the Regulations in force prior to the Civil Code as respects suits against Government and its officers in the Civil Courts of the Mofussil, we think that in suits brought against the Government, *eo nomine*, under the provisions of the Code, the Local Government must be considered as the party sued; and having reference to Sec. 5 which does not contain the words 'carrying on business,' we may

⁶⁹ II. Hyde, 153.⁷⁰ 1 Bourke, Pt. VII, V. hon. H. C. App. 1.⁷¹ I. L. R. VI. Bom. 251.⁷² I. L. R. IV. Mad.⁷³ I. M. H. C. R. 206.

observe that the jurisdiction to entertain suits against the Government as such under that section alone would, it seems to us, exist only where the cause of action arose. In the Letters Patent, however, the additional words, 'carrying on business,' can, we think, reasonably be applied to the Government as a deliberative body, and to the locality where its members meet and exercise all the functions of Government; similar words are to be found in the County Courts' Act 9 and 10 Vic. c. 95, and the cases in which a construction has been put upon them by judicial decisions in England, in regard to their application to an incorporated Company, bear a strong analogy to the present case."

The view of Mr. Justice Wells was followed however in *Doya Narain v. The Secretary of State for India in Council*,⁷⁴ in which a Division Bench of Calcutta High Court held, that the business of governing a country was not a business within the meaning of Cl. 12 of the Letters Patent, and that the Secretary of State could not be said to carry on business anywhere, and that it appeared to have been overlooked in the *Madras Case*, that the suit should have been considered as brought against the Secretary of State, and that Sec. 65, Act 21, 22 Vic. c. 106, did not constitute the Secretary of State a body corporate, but simply laid down that, that officer and department should be sued as a body corporate, the object of the suit being to obtain satisfaction of the plaintiff's claim out of the Indian Exchequer, the suit not being really against any person or any real body corporate, and that view was supported by the observations of Lord Justice James, in *Kinloch v. Secretary of State for India in Council*.⁷⁵

Zamindari business is not business of the kind contemplated by the rule; but it is not commercial business alone that is contemplated. Where a man showed that he was in daily attendance upon his patients as Surgeon, Apothecary, and Accoucheur within a certain District, he was held to be carrying on business in that District. In *Gosrami v. Govar-*

res, L. J., in this case incidentally observed that "when you look at the Act 21 and 22 Vic. c. 106, all the property and assets of the East India Company were not transferred to any body corporate which were successors to the East India Company, but were vested in the Crown in trust for the Government of India; and the words 'The Secretary of State for India in Council' which are mere words providing that that officer or that department would be capable of suing and being sued, are nothing more in my opinion than words indicating the mode by which the Government of India is to sue and

to be taken in their most general sense, that they must therefore be held to denote a personal carrying on of the business by the defendant, that otherwise 'a man living at Calcutta or Bombay, or any other distant place, and there carrying on in person his business, might, because of his carrying on business here by a *gumashta*, clerk or agent, or by occasional visits only, be sued in this Court at the discretion of the plaintiff without any regard to the place where the cause of action arose; and this evident inconvenience and hardship could not have been intended.' His opinion was modified however, in *Chinnammal v. Tutukannatammal*,⁸¹ in which it was held that a person cannot be said to dwell where he has no place of business, and the sales are effected by another in his trade or business of a general broker for a commission received from the purchasers; and the learned Chief Justice said; "Giving proper effect to the other words of the provision, the section, I think, requires that the defendant should, at the time of the commencement of the suit, carry on within the local limits of the Court's jurisdiction some independent regular business in person, as in the case of *Mitchell v. Hender*,⁸² or at any office or other fixed place of business⁸³ either personally, or by clerks, or servants employed by the defendant and conducting the business under his control and in his individual or partnership name." The same view has been taken in *Muthaya Chetti v. Allan*,⁸⁴ in which the defendant carried on business at several places by means of agents, and Sir Charles Turner, C. J., in the Original Court said:—"Although persons working for gain within those limits are not liable to the jurisdiction of the Court unless they personally work within

⁸¹ The Calcutta High Court later on followed that view in *Chunder Churn v. Jeejeebhoy*, in which Sir Richard Garth, C. J., said, in the judgment of the Court—"We are not prepared to dissent from the authorities cited in the reference of *Subbaraya v. The Government*,⁸⁵ and *Mitchell v. Hudson*,⁸⁶ which lay down that the carrying on of business must be personal on the part of a defendant, if it is sought to bring him within the jurisdiction of the Small Cause Court on the ground of carrying on business." The circumstances of this case were peculiar, as jurisdiction was sought in the case against a person who had dissolved his partnership and since the dissolution taken no interest in the partnership business, and remained liable to the plaintiff only on account of not giving a proper notice of the dissolution, and Sir Richard Garth observed that if he can be said to carry it on, it is only in the sense that he has not, as against the plaintiff and other old customers, properly put an end to the authority of his former partners to bind him by their acts done in the partnership name. No other grounds were given for the decision, and it is not likely to be followed.

⁸¹ III M. H. C. R. 145

⁸² 23 L. J., Q. B. 273

⁸³ *Rolfe v. Learmouth*, 14 Q. B.

⁸⁴ I L. R. IV

⁸⁵ I L. R. VIII Cal. 675

⁸⁶ I M. H. C. R. 296

⁸⁷ 23 L. J. Q. B. 273

the limits, there is nothing in the provisions of the *Letters* which confines the jurisdiction of the Court to persons who *personally* carry on business within the limits, and the omission of the term 'personally' before the words 'carry on business,' and its introduction before the words 'work for gain' offered a strong argument that it was not intended the former words should be so limited." On appeal, Kindersley and Tarrant, J.J., took the same view, and agreed with the Chief Justice that Sec. 12 "does not require persons to personally carry on business within the limits specified." These decisions were followed by Mr. Justice Scott in *Kessonji v. Khimji*.²² In the recent case of *Girdhar v. Kassigar*,²³ it was not even disputed that as a general rule, the carrying on of business need not be personal, and Sir Charles Sargent said, that the decision in *Muthaya Chetti v. Allan*, and the reasons given in support of it by Sir Charles Turner were conclusive. It is generally agreed upon however, that employing a person as one's commission agent or simply consigning goods to a commission²⁴ or general agent²⁵ for sale by him in the exercise of his own calling does not constitute carrying on business at the place, where that person or agent may be residing or carrying on his own business, or doing or selling what he may have been employed to do or sell.

153. In *Kessonji v. Khimji*,²² Scott, J., held, however, that on account of the general principles of International law the carrying on of business by a mere agent will not confer jurisdiction on the High Court over a non-resident foreigner. The learned Judge thought that he could give the word 'defendant' in the same clause a double meaning, i.e., a limited sense as regards jurisdiction over those who carry on trade, and a general sense inclusive of foreigners and British subjects in its application to those who personally work for gain or dwell there, as "to do otherwise would be contrary to the general presumption, that the Legislature does not intend to exceed its jurisdiction; and it would be a violation of the rule that every statute is to be interpreted and applied, so far as its language admits, so as not to be inconsistent with the comity of nations, or with the estab-

²² I. L. R. XII Bom. 507.

²³ I. L. R. XVII Bom. 662.

²⁴ *Forbes*, VIII B. H. C. R. O. C. 102.

²⁵ *Mohun v. Protap Chunder* XI W. R.

²¹ *Corbett v. General Steam Nav. Co.*, 4 H. and N. 492.

²² *Minor v. Lon. & N. W. Ry. Co.*, 10 B. N. S. 325.

²³ I. L. R. XII

lished rules of Private International Law. All general terms must be narrowed in construction to avoid any such violation."⁶

This limitation in regard to non-resident foreigners, of the expression 'carrying on business' has been disapproved by a Division Bench in *Girdhar v. Kassigar*,⁹⁶ in which it was contended that the Bombay Small Cause Court had no jurisdiction as the defendant resided in Cutch, a Native State, and carried on business in Bombay only by a *Munim*; and the contention was overruled. Sir Charles Sargent, C. J., said, that there was no authority for there being any so comprehensive a rule of construction as was relied upon by Scott, J., and referred to the case of *Companhia de Mozambique v. British South Africa Company*,⁹⁷ in which Lord Esher, M. R., said—"The question whether the courts of a nation will or will not entertain jurisdiction of any dispute is to be determined exclusively by the nation itself, *i.e.*, by its Municipal law. If by express legislation the courts are directed to exercise jurisdiction, the courts must obey. If there is a proper inference to the same effect, the result is the same. But there are certain rules which have by universal consent indicated the circumstances from which the inference may properly be drawn." The learned Chief Justice after observing that one of those rules was that *prima facie*, all legislation was territorial, and that the question was whether the Indian Legislature did not intend to depart from that rule, said:—"It may be true that non-British subjects who do not reside in British India do not make themselves personally subject to the general Municipal law of British India, still by establishing their business in British India, from which business they expect to derive profit, they accept the protection of the territorial authority for their business and their property resulting from it, and may be fairly regarded by so doing as submitting to the jurisdiction of the

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ected debts in England. But the general word in the same statute did not act of bankruptcy in England although adjudication was presented was quoted with approval and no difference of the debt were

of an Englishman who had trade *ex-parte*. It was decided that the same rule should be applied abroad if he commits any wrong in England before the petition for winding up is presented *ex-parte*. C. J. in *Moreshet* L. J. held that it

⁹⁶ 12 Ch. D. 622.
⁹⁷ 4 Ch. Ap. 374.
⁹⁸ 1 Ch. D. 507.

⁹⁶ 1 L. R. XVII Bom. 662.

courts of the country. Moreover, in considering what was the true intention of the Legislature, it is right to bear in mind the special circumstances of the Presidency towns in this country as regards the great number of non-British subjects who carry on trade within them, either personally or by their *munims* and other agents, and are constantly having transactions with British subjects giving rise to causes of action both within and outside the Presidency towns, the latter of which do not fall under cl. (a)—a circumstance which might well affect the Legislature in determining the jurisdiction of the Presidency Courts, as regards defendants. These considerations coupled with the general language of the clause, which requires it to be construed as giving jurisdiction to try suits against defendants generally who satisfy any one of the conditions mentioned in the clause irrespective of their being British or non-British subjects, create, in my opinion, a strong presumption in favor of a less strict application of the 'territorial' principles of construction above referred to, than was adopted in *Kessowji Damodar v. Khimji Jairam*;¹⁶ and I cannot think that the above considerations are entitled to less weight because the construction would enable actions to be brought in the Presidency Courts against non-British subjects on causes of action arising out of British India or even out of India. Such causes of action would necessarily be personal action, to which the rule of territoriality has never been applied in England." Starling, J., said "The Legislature has enacted that, if a person carries on business within the jurisdiction, a suit may be brought against him, and I do not think we ought to explain away the plain words of this enactment and say that it is not every person who carries on business within the jurisdiction who may be sued, but only British subjects. . . . The real test in these cases is whether the defendant has done within the jurisdiction, either personally or by his authorized agent, an act which brings him within the terms of the enactment applicable to his case, and I do not see any reason why the trading of a foreigner by his servants within the jurisdiction should not be held to be such an act."

It was urged against this construction, that the Foreign Courts would not recognize a judgment passed by a British Court in such a case, but the learned Judges relying on *Ashbury v. Ellis*,¹⁷ said that, that was not a matter for their

consideration. It may be observed, however, that the question before their Lordships of the Privy Council was of the validity of a New Zealand Statute, and not of its construction; and the actual decision of their Lordships turned on the concrete facts of the particular case. Further the fact of a general recognition or non-recognition of a jurisdiction by the general consent or comity of nations is often taken into consideration in determining the existence of a jurisdiction, when the jurisdiction is not conferred by express and distinct words; and the rules of procedure construed subject to the question of the existence of jurisdiction as determined on general principles. This was affirmed in *Cookney v. Anderson*,¹⁰⁰ in which Lord Westbury said,—“Any rules which a Court of Justice may make touching its procedure must, of course, be taken as intended to apply only to such jurisdiction and authority as it has the right to exercise. . . . It would be absurd to suppose that the authority to make orders for the improvement of procedure involved authority to usurp a new jurisdiction, either in respect of persons or of things.” This was quoted with approval by Lord Esher, M. R., in the very case of *Companhia de Mozambique*,¹ which was relied on by Sir Charles Sargent, and in which the question was as to whether the English Court had jurisdiction over suits for trespass to real property in Foreign Territory in Africa. Lord Esher, M. R., himself also said in his judgment in that case—“With regard to acts done outside its (a nation’s) territory, it (the nation) has no jurisdiction to determine the resulting rights growing out of those acts unless such jurisdiction has been allowed to it by the comity of nations. This reduces the question to be, whether, in regard to an act of trespass done to land situated outside its territory, there is evidence to justify the inference that by the comity of nations the jurisdiction to determine the rights resulting from such an act has been allowed by other nations to this country, and has been accepted by this country. And the form of the inquiry shows, that the solution of that question does not depend upon the laws of procedure in litigation adopted by this country, but upon the comity of nations as between this country and other countries. . . . That the Municipal rules of procedure are not to be considered until the question of jurisdiction is determined is pointed out by Lord Westbury in *Cookney v. Anderson*, that the English rules of venue are rules made for the purpose of determining in what

part of England certain causes shall be tried by the Common Law Court or Courts cannot be denied. They are, therefore, rules for regulating the procedure of the English Court or Courts. They can be applied only to the trial of causes which the English Courts have jurisdiction to try. The question of jurisdiction cannot be made to depend on those rules. It must be determined by other considerations before those rules can have any application. . . . The truth is that there are two kinds of venue, the one venue for determining jurisdiction, the other venue for determining place of trial. The one is international, the other municipal. . . . A great number of cases were cited in which the English Courts have exercised jurisdiction in respect of acts done abroad. By universal consent they were triable by English Courts, because they were transitory actions. Nevertheless, the want of a venue for trial was a difficulty in them, which was overcome by a fiction. But such a fiction was never attempted to be used on the real or local actions on which the courts had not jurisdiction. On appeal from the decision in that case to the House of Lords, their Lordships expressly re-affirmed the principle, that the Judicature Acts, being enactments for the improvement of procedure must not be so construed as to give a new jurisdiction to the High Court, unless the intention of the Legislature to the contrary is perfectly clear.²

154. It is not necessary to a man being held to carry on business at a place, that he should carry on the business there permanently. The contrary appears to be the practice in England. Thus a builder who took a contract to erect buildings in a certain district and set up workshops and a counting-house there, but retained his permanent place of business elsewhere, was held not to carry on business in that district.³ Here, however, a person who had no regular office, but went once or twice a week from the Mofussil to a friend's house in Calcutta, and saw people there on business, and contracted there with some man for the hire of cargo boats, was held to carry on business or personally work for gain at Calcutta.⁴ In *Hurjeebundas v. Bhugwan Doss*,⁵ the defendant had his main business in Patna district, but used to send to Calcutta thousands of Rupees worth of country produce, and used himself to go there three, four or five times in the year, and stay with his agent

British South Africa Co. v. Companhia de Mo-
zambique, 1 A. C. 602.

² Goulott v. Harris, 29 L. T. 75.
³ Grahame v. Grahame, 11 B. L. 102.
⁴ VII B. L. 102.

dar, and sell his goods there, paying the *arhutdar* a commission on the price of the goods sold and no rent of the place. Phear, J., held, that he could not be said to carry on business at Calcutta, observing, "that the carrying on business, for the purpose of that Clause, must involve pretty much the same element of permanency as is necessary to convert a mere 'staying' into 'dwelling.'" This decision was, however, reversed on appeal by Norman, O. C. J., and Macpherson, J.,⁶ and the substitution now of the word 'reside' for 'dwell' destroys the basis of the analogy on which the argument of Phear, J., was based. In Bill No. II of the Civil Procedure Code of 1877, an Explanation was added to provide that the business contemplated must be carried on at a fixed place for at least a certain time, but the Explanation was omitted from Bill No. III. As to the personally working for gain, however, Farran, J., has expressed an opinion in *Gosvami v. Govardhanlal*,⁷ that the working should be habitual as was the case in *Narain Das v. Newton*,⁸ and said, "To constitute work, there must be some mental or physical effort. To take advantage of an innate holiness as a reason for accepting presents or offerings as your natural due, is not work in the usual acceptation of that term; nor is the blessing which the defendant invokes upon the dwellings which he visits." In *Narain Das v. Newton*,⁸ an Advocate of a High Court, going there whenever engaged to appear, was held to personally work for gain within its limits even though he resided outside them.

155. A business may of course be carried on by a person for the purpose of the rule relating to jurisdiction at more than one place at the same time. This was admitted even in *Brown v. London and North-West Railway Co.*,⁹ in which it was held that a business could only be said to be carried, where it was managed, and the place of business in general must be the place where the general superintendence and management take place. In *Shiels v. Great Northern Railway Co.*,¹⁰ it was only held that a Railway Company could not be said 'to carry on its business' in a particular district, merely because it had there a station where tickets were issued, and contracts in relation to the carriage of goods made; as the issuing of such tickets and the like is not the business of a Railway

⁶ VII B. I. R. 285.
⁷ I L. R. XIV Bom. 333.
⁸ VI All. H. C. R. 48.

⁹ 32 L. J. Q. B. 318.
¹⁰ 30 L. J. Q. B. 331.

Company, being a very small part of, or one of, the transactions connected with that business; but Mr. Justice Hill, expressly added, that he did not mean to say that a private trade or firm might not carry on business, within the meaning of the Statute, in more than one place. In the *Keynsham Blue Lias Lime Co. v. Baker*,¹¹ where the Company's business was to manufacture and sell their goods, and the Directors met in London, but the sales were made at the place where they got the material and prepared it for sale, the latter was held to be the true place of business. The Bombay High Court followed the same principle in their decision in *Framjee v. Hormasji*.¹² "To determine," said Sausse, C. J., in delivering the judgment of the Court in that case, "whether a defendant is carrying on business, it must first be ascertained what his particular trade, calling, or occupation is, and then we can examine whether the facts proved amount to a carrying on of that particular trade, calling, or occupation within the jurisdiction. The present defendant is admittedly a retail vendor in European goods, and obtains his livelihood by the profit which he makes upon his sales; without 'sale' he could not make profit, or, in other words, he could not carry on business for the purpose of gaining a livelihood. 'Sale' is an essential ingredient in carrying on this defendant's business, and in the present case to give this Court cognizance of suit upon that ground, it must be shewn that 'sale' by the defendant in the way of a retail dealer has taken place within our territorial limit. The place of sale, in the present case, is the true place of the defendant's carrying on business;"—and though the defendant had at Bombay a confidential assistant upon a considerable salary and allowance for storehouse rent and clerks, who by the defendant's order kept regular books in the defendant's trade name, headed 'Bombay firm,' and was in the habit of signing the name of the firm, adding by the hands of their servant Ruttonji, and who received the defendant's goods from Europe, made purchases in Bombay on his behalf, and forwarded them all up-country, the High Court held that the defendant could not be said to carry on business at Bombay.

It is thus enacted by Explanation II added to Sec. 17 of the Civil Procedure Code, that a corporation or

be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. This is generally true in respect of foreign corporations also, which are primarily supposed to be present, and to carry on business in the state under whose laws they were created,¹³ and the officers of a corporation going to another state do not carry it with them. If a corporation is authorized by the laws of a state, other than that of its creation, to do business in the former, and to have there the same privileges and exercise the same powers as in the state of its creation, and it avails itself of the privileges and exercises the powers thus conceded, it consents to the assumption by the courts of the former state of jurisdiction over it in proceedings arising out of transactions within its territory,¹⁴ and we apprehend that if a corporation engages in business in another state than that of its creation, even in the absence of any express authorization by law, its courts may acquire jurisdiction over such corporation by service of process on its resident agents in the mode provided by the local laws.¹⁵ In *Newby v. Colt's Firearms Co.*,¹⁶ it was argued that the American corporation was resident in America and must be served, if at all, as a foreigner resident out of the jurisdiction. The Queen's Bench overruled this contention, however, and Blackburn, J., in delivering the Court's judgment, said: "This would be so, if the foreign company had merely employed an agent here, who made a contract for them; but we think it is different where the foreign corporation actually has a place of business and trades in this country such a corporation does, for many purposes, reside both in England and in its own country. In the case of *Carron Iron Co. v. Maclaren*,¹⁷ Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts.

¹³ *Railway Co. v. Whitton*, 18 Wall. 270.
St. Clair v. Cox, 106 U. S. 359.
Western U. T. Co. v. Dickinson, 13 Am.
 Rep. 205.
 Pr. Jud. 195.

¹⁴ *Baltimore and O. R. R. Co. v. Gallahue*
 Adm'r. 65 Am. Dec. 254.
Co. v. Harris, 13 Wall. 65.

¹⁵ *Colorado Iron W. v. Sierra Grande M. Co.*,
 22 Am. St. Rep. 433.
Humboldt R. R. v. Crane, 103 Ill. 234.
Mineral Point R. Co. v. Keep, 74 Am. Dec.
 134.

¹⁶ 7 Q. B. 293.

¹⁷ 5 H. L. C. 450.

He says: 'If the service on the agent is right, it is because, in respect of their house of business in England, they have a domicile in England, and in respect of their manufactory in Scotland, they have a domicile there.' The majority of the Lords took a different view of the facts, and thought that, though the corporation possessed property in England, and had agents there, they did not carry on business there; but we do not think that they differed from Lord St. Leonard's view of the law if they had agreed as to his facts We think that, when once it is established that the corporation is to be treated as resident in England, the proper officer (for the service of writ) is the officer at the English Branch, and that it is not necessary to serve the process on the officer at the head office abroad." The same was held in *Lhoneur v. Hongkong S. B. Corporation*,¹³ and both these decisions were followed in *Haggin v. Comptoir D'Escompte de Paris*,¹⁴ in which Cotton, L.J., after observing that the question was, whether the corporation was resident in England, said: "The principal part of its business is carried on at the office in London, and I think that when a foreign corporation, established by foreign law, sets up an office in England and carries on one of the principal parts of its business here, it ought to be considered as resident in England, and be treated as if it were established by English law. In my opinion that is the law, independently of all decisions; but the case of *Newby v. Van Oppen* is an authority for that view."²⁰ That case was decided under the corresponding section of the Common Law Procedure Act, and has never been questioned. Although distinctions have been made between it and some modern cases, yet the law there laid down has never been substantially dissented from. What was said in that case by Blackburn, J., comes to this, that if a corporation established by foreign law carries on business here, it must be considered as resident in this country, and must be equally liable to service as if it was established here. This is what he says, 'The clerk or officer must be in the nature of a head officer whose knowledge would be that of the corporation.' If he were only a clerk and performing a merely ministerial office instead of carrying on substan-

tial business of the corporation, service on him would not be service on the corporation within sec. 16 of the Act, nor within the 8th rule of Order IX; but that case lays down, as I think rightly, that when the foreign corporation is substantially carrying on their business at an office in this country, it must be considered as resident here, and liable to be served with writs in the English Courts. Then we have the case before Bacon, V. C., *Lhoneux v. Hongkong Corporation*,²¹ which was decided on the same principle. Now, what are the cases against this principle? The case of *Ingate v. Austrian Lloyds*²² has been referred to; but the corporation in that case was in no sense resident here. It had no officer here, and the question did not arise under sec. 16, but was whether secs. 18 and 19, which relate to service of process upon persons residing out of the jurisdiction, referred to foreign corporations. It is true that Cockburn, C. J., did say that sec. 16 did not refer to foreign corporations, but that was not the question before the Court. What he said is this: 'The 16th section clearly applies only to corporate bodies in this country. All the preceding sections relate exclusively to persons resident within the jurisdiction. The 18th and 19th sections relate to British subjects and foreigners resident in foreign parts.' That was a very different question from that before us, and that case is no authority adverse to *Newby v. Van Oppen*.²³ There was another case, *Mitter v. Messageries Maritimes*,²⁴ where Lord Coleridge used some expressions which appear inconsistent with the view which we take in this case. But there the foreign corporation had offices in Paris and no office in London, but merely an agent. What Lord Coleridge said is really against the contention of the appellants. He says: 'It is a condition precedent to a good service that the corporation must either have a domicile in this country or a distinct place where the business of the corporation is carried on by a person answering to this corporation. The service must be upon one single officer or clerk of the corporation,' and he points out that in the case before him the corporation could not be said to be carrying on business or to have an office here. He also says further on, 'The judgment of Lord St. Leonards, with which as regards the law the House of Lords agreed, though

²¹ 12 Ch. D. 446.
²² 4 C. B. (N. S.) 704.

²³ 7 Q. B.
²⁴ 54 L. J. (Q. B.) 537.

they differed from him as to his view of the facts, in the case of *Carron Iron Co. v. Maclaren*,²⁵ was that the corporation in question could be sued on the ground that in respect of the place of business in this country they had a domicile in England.' And A. L. Smith, J., says: 'The case of the *Carron Iron Co. v. Maclaren* does not affect this case, as the service there was held to be good on the ground that the defendants had practically a head office in this country for carrying on business here.' Then again, *Mackreth v. Glasgow and South Western Ry. Co.*,²⁶ was a different case, because there the clerk who was served was not a principal clerk, but only a subordinate clerk with very limited duties. None of these cases in any way vary the construction which I have put upon the rule. Even where a foreign corporation does business in a state without complying with its statute requiring the designation of an agent on whom service of process can be made, it will probably not be permitted to urge its non-observance of the law for the purpose of avoiding the jurisdiction of the courts of the state.²⁷

156. In regard to miscellaneous proceedings the difficulty of determining the locality is still greater, and as a fact a distinction based on their locality is not adopted generally for demarcating the jurisdiction possessed by the British Courts individually between them. The Probate Jurisdiction of the High Courts thus extends concurrently to the entire British India, and that of the District Judge is said to extend to all cases within his District.²⁸ Similarly, insolvency proceedings, outside the Presidency towns are to be taken in the District Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody.²⁹

157. But, as observed above, it is not only this general Court must have jurisdiction over the parties. jurisdiction of a court over a suit with regard to its nature, amount or locality, that can make it a court of competent jurisdiction in regard to the suit. It is universally held that the court should have jurisdiction over the parties also, and

²⁵ 5 H. L. C. 416.

²⁶ L. R. 5 Ex. 149.

²⁷ *Hagerman v. Empire State Co.*, 97 Pa. St. 334.

²⁸ Sec. 235, Act X of 1860.

Sec. 51, Act V of 1861.

²⁹ Sec. 346, Act XIV of

that a decision against a person who is not a party to a suit is not valid.³⁰ A person who is deceased cannot become a party to a suit, and a decision in a suit, either of the parties whereof was dead at the time of its institution, will of course be void.

As a general rule, all the Civil Courts in British India are now competent to take cognizance of all suits without regard to the nationality of the parties to them. In the early years of the British rule in India, Courts presided over by native officers were not competent to take cognizance of suits to which Europeans or Americans were parties, but this distinction was removed in 1850, and the Civil Procedure Code of 1859 provided that—"no person shall, by reason of his descent or place of birth, be in any Civil proceeding exempted from the jurisdiction of any of the courts." This provision has since then remained on the Statute Book, and is re-enacted in sec. 10 of the present Civil Procedure Code. In *Fritz Olnier v. Lavezzo*,³¹ in which the defendant was the Master of an Italian Vessel. Sir Richard Garth, C. J., in delivering the judgment of the Calcutta High Court, said—"There is no doubt whatever that by the law of this country, which is the same in that respect as the law of England, Civil Courts, as a general rule, have jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction." There are, however, still some Special Acts,³² by which particular persons or classes of persons are entirely or partially, finally or provisionally, exempt from the jurisdiction of all or some of the grades of courts. These exemptions generally have reference to the head or members of certain families that ruled tracts of country since conquered by the British Government.

157A. The exemption of independent foreign sovereigns from the jurisdiction of all Civil Courts is as a general rule universally admitted. Courts have no jurisdiction over foreign states and rulers. The exemption has been attempted to be justified on several principles, but it appears to be based primarily on the ground that an exercise of jurisdiction over him is incompatible with his real dignity, that

³⁰ *Ford v. Doyle*, 37 Cal.
Overstreet v. Davis, 24
Moseley v. Locke, 7
³¹ L. L. R., X Cal. 676

E. g. Title Sec. 2 Act XIII
Sec. 11 Act XI of 1853
Sec. 2 Act XX of

is to say, with his absolute independence of every superior authority. In *Duke of Brunswick v. King of Hanover*,²³ the suit was against a foreign prince as well as a British subject, but Lord Langdale in his elaborate judgment admitted that "it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the Courts there." In *The Parlement Belge*, Brett, L. J., in delivering the judgment of the Appeal Court, after a critical examination of a great number of previous authorities said: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." This exemption applies to all sovereigns, the independent sovereign of the smallest state standing on the same footing as the monarch of the greatest. In *The Charkich*,²⁴ the exemption was held not to apply, as the Khedive was held not to be an independent sovereign. In *Mighell v. Sultan of Johore*,²⁵ it appeared that the Sultan had bound himself not to exercise some of the rights of a sovereign ruler except in certain particular ways, but Wille, J., said: "That does not deprive him of his character as an independent sovereign. There can be no doubt that he is still an independent ruling sovereign, and this case must be decided upon exactly the same considerations as if the ruler of some undoubted great power, such as the King of Italy, or the President of the French Republic, had been sued in the courts of this country." The same view was taken on appeal, Kay, L. J., saying "The agreement by the Sultan not to enter into treaties with other Powers does not seem to be an abnegation of his right to enter into such treaties but only a condition upon which the protection stipulated for is to be given."

²³ 6 Brav. 50.
²⁴ 4 A. & E. 50.

| ²⁵ 1894, 1 Q. B. 149.

In India the position of Protected independent Native Princes is anomalous, and Section 433 of the Civil Procedure Code broadly enacts that the present Sovereign Princes or Ruling Chiefs may not, except in a certain case, be sued in any Civil Court in British India, except with the consent of the Governor-General in Council, which can be given only if such Prince or Chief—

- (1) has instituted a suit in the court against the person desiring to sue him ; or
- (2) by himself or another trades within the local limits of the jurisdiction of the court ; or
- (3) is in possession of immovable property situate within those limits and is to be sued with reference to such possession or for money charged on that property.

157B. Nor can a sovereign be sued in his own courts, except with his consent. That the king can do no wrong is a fundamental doctrine even of the English Constitution. In *P. & O. S. N. Co. v. Secretary of State for India*,³⁷ Sir Barnes Peacock, in delivering the judgment of a Full Bench of the Calcutta Supreme Court said: “It is an attribute of sovereignty, and an universal law, that a state cannot be sued in its own Courts, without its consent.”³⁸ In *Nobin Chunder Dey v. The Secretary of State for India*,³⁹ Phear, J., whose judgment was affirmed on appeal, said, “Generally it may be said that, under the English Constitution, the Crown, the Government, or State cannot be sued in its own courts. In the event of any person being aggrieved or injured by the acts or omissions of a Government servant or department, the remedy, if any there be, can only be sought by petition of right, unless the Government servant, to whose fault the grievance is attributable, so conducted himself in the matter as to render himself personally liable. And this holds true with regard to the Colonies as well as with regard to the mother country.” Sir Charles Turner, C. J., in delivering the judgment of the Madras High Court in *The Secretary of State v. Hari Bhanji*,⁴⁰ said, “It is an

³⁷ V. B. H. C. R. App. 1.
³⁸ Kent, Comm. 1 207 n. [6th Ed.,
 Story Cons. Un. St. [2nd Ed.]

³⁹ I. L. R., I Cal. 11.
⁴⁰ I. L. R., V Mad. 277.

acknowledged rule of sovereignty and has been described as a rule of universal law that a sovereign is not liable to a suit in his own court without his consent. Consequently in England the form of procedure permitted to a subject, who considers himself aggrieved by an act of the Crown, is by petition of right. When an order has been passed that justice be done, and not before, the courts are at liberty to enquire whether the claim is of such a nature that it can be maintained and whether it is well founded." And in England even at the present day a *fiat* from the Crown has to be obtained in each particular case before any matter is referred to the judicial tribunals for adjudication.

The question has received the fullest discussion in the United States, where also it is unanimously held that a state is not liable to be sued in its own courts or in those of any other state without its express consent.⁴¹ In *Beers v. Arkansas*,⁴² the United States Supreme Court said broadly that "it is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and may withdraw or withhold its consent whenever it may appear that justice to the public requires it." And so absolute is the exemption of the Government from the jurisdiction of Civil Courts that it is generally held that in the absence of an express consent, a set-off cannot be maintained against a state for the same reasons that forbid an original suit.⁴³ This was held in *Chevallier v. State*,⁴⁴ in which Hemphill, C. J., said: "It is only necessary to refer to the admitted principle that no action can be instituted on a claim against the Government at the instance of an individual, either directly, or indirectly, by way of set-off, unless

⁴¹ *The Davis*, 10 Wall. 18.
Board of Liquidation v. McComb, 93 U. S. 581.
Cunningham v. Mason R. Co., 100 U. S. 446.
Raymond v. State, 23 Am. Dec. 383.
People v. Miles, 56 Cal. 401.
People v. Dennison, 84 N. Y. 272.
State v. Baltimore, R. Co., 34 Md. 344.
Williamsport R. Co. v. Com., 33 Pa. St. 286.
Tate v. Salmon, 79 Ky. 490.

Hosner v. De Young, 1 Tex. 764.
⁴² 30 How. 529.
⁴³ *People v. Miles*, 56 Cal. 401.
White v. Governor, 18 Ala. 767.
People v. Corner, 50 Hun. 299.
Borden v. Houston, 3 Tex. 594.
State v. Leckie, 14 La. Ann. 636.
Newport Bridge Co. v. Douglas, 13 Rush, (Ky.) 673.
⁴⁴ 10 Tex. 315.

by the sanction of express law to that effect. In *Battle v. Thompson*,⁴⁵ it was held that a party sued on a single bill, payable to the State Treasurer, given for cotton sold by that office, could not plead by way of set-off to the action valid coupons, taken from the bonds of the state. And Pearson, J., in delivering the judgment of the Court said, "The test of a set-off or counter-claim under the statute is this: could the defendant maintain an action against the plaintiff? Tried by this test the defence fails, for a citizen cannot maintain an action against the state. In *Bates v. The Republic*,⁴⁶ it was said that a set-off was in the nature of a cross-action, could not be set up against the Government without its consent, and the proposition that the Government is above the reach of judicial authority by direct action, but within its control and coercive power by indirect suit, is a solecism and absurdity in its very terms." In *Raymond v. State*,⁴⁷ the drawer of a bill of exchange, accepted by the drawees for his accommodation, and by the drawer delivered to the state in payment for a debt owed by him to it, was held not to be able to maintain a bill in Chancery against the state and the acceptors to set-off against the demand of the State an indebtedness by it to him growing out of a distinct transaction. And a State will have the same immunity from a claim of set-off in the courts of a sister state. In *Moore v. Tate*,⁴⁸ Folkes, J., in delivering the judgment of the Tennessee Supreme Court said, "While a sovereign state may bring and maintain a suit as any other suitor, she cannot be sued in her own or a foreign court, unless she has signified her consent thereto, either by statute or by some other unequivocal means. These universally recognized principles are not challenged by the learned counsel for the defendants, but his contention is, that the State of Alabama, having invoked the jurisdiction of the courts of this State, for the purpose of recovering a judgment against a citizen of Tennessee, must submit itself to the same jurisdiction for the purpose of allowing such citizen to interpose any defence he may have, to the extent of preventing any recovery against him; 'that when the state undertakes to litigate with the citizen, the latter may, by way

of set-off or counter-claim, make such defence as will defeat the recovery though not entitled to judgment over against the state, in the absence of some legislative enactment authorizing the recovery.' This contention goes too far. It is true that when the state voluntarily places itself in the position of a suitor, whether in its own courts or in those of a sister state, it will be held to have laid aside its sovereignty, and to have taken on the garb of an ordinary suitor, so far as concerns all proper matters of adjudication growing out of the cause of action sued on, and the defendant would be entitled to plead and prove any and all matters properly defensive, including credits and set-offs, so far as the latter are dependent on, connected with, and grew out of the transaction which constitutes the subject-matter of the suit.' Such defences, though sometimes called set-offs, are not strictly set-offs. 'A counter-claim is sometimes a mere set-off'; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is, that they are wholly independent suits, which for convenience of procedure, are combined in one action,' as was said in *v. Bradnum*. That the immunity from

suit possessed by the state as a prerogative of its sovereignty applies to a cross-action by set-off, unless expressly provided otherwise by statute, is fully sustained by several adjudications." The last case virtually overrules, without referring to, the *Gaillard case*.⁵⁹ We hold that an independent claim cannot be set-off against a demand of the State, defensively or otherwise, without the affirmative consent of the State, and that the courts of this State will apply to a sister State suing here the same rule in this respect that is applicable to our own State when a

plaintiff." The contrary has been held in some cases, and even enacted in some of the States. Most of such decisions are collected and explained in the above case. In *Common-Wealth v. Owensboro and N. R. R. Co.*,⁶⁰ the Court said: "When the state undertakes to litigate with the citizen, the latter may, by way of set-off or counter-claim, make such defence as will defeat the recovery, but is not entitled to a judgment over against the state, in the absence of some legislative enactment authorizing the recovery." This was the language of the defendant's contention in *Moore v. Tate*; but Folkes, J., said: "It is sufficient to say of this case that it contains no discussion of the question,—it cites no authority. It was a suit for taxes, and it was adjudged that no taxes were due. So that at best it is a *dictum* merely." The rule does not, however, forbid the defendant from pleading or proving any matters properly defensive, so far as they are dependent on, connected with, or grow out of, the transaction which constitutes the subject-matter of the suit; but that is distinguishable from set-off and justifiable on the ground that the claim is in the nature of a payment, or credit, or recoupment to which the defendant is entitled, the demand of the state being in fact for the balance.

The immunity of the State is quite absolute, and may not be overthrown by indirection, as, for instance, by the institution of suits against state officers, when really they are suits against the state.⁶¹

Thus in *State v. Sneed*⁶² it was held that a proceeding by *mandamus* to compel an officer of the State to do that which the legislature has prohibited him from doing, for example, to compel a tax-collector to receive certain obligations of the state in payment of taxes, would be, in effect, a suit against the state, and not maintainable. In *Mills Public Co. v. Larrabee*,⁶³ it was held that where the Executive Council of a State should give a contract to a certain party, it would not be competent for an unsuccessful bidder to sue the council to enjoin the contract with that party and compel the giving of the contract to him. Mr. Hawes in his *Work on Parties* says in

⁶⁰ 81 Ky. 573.

⁶¹ *Shoemaker v. Grant County*, 36 Ind. 175
v. *Burke*, 33 La. Ann. 496.

Taylor v. Hall, 71 Tex. 206.

⁶² 9 Baxt (Tenn.) 472
⁶³ 78 "

general language that "an action in the courts of the United States against the executive officers of a state, in their official capacity is in effect a suit against the state, and as such is prohibited by the 12th Amendment to the Constitution."

This immunity of the state does not pass to a vendee of its property or rights.⁶⁴ This is on the general principle that the immunity affects only the remedy and not the right. It was held directly in *Coster v. Mayor of Albany*⁶⁵ that the fact that a state would not be subject to an action on behalf of a citizen would not establish that he had no claim against the state, or that no liability existed from the state to him, but only that there was no proper tribunal to try the claim, and no remedy. Thus the creditors of a State have nothing, no doubt, to rely upon except her good faith, and the State can certainly, so far as the judicial tribunals are concerned, postpone the time of payment or refuse to pay at all.⁶⁶ The remedy in such cases is by a petition to the Sovereign or the Legislature, who, it is fair to presume, will make provision for its full execution, and do ample justice.⁶⁷ If the state is made liable to be sued in a certain court no other court can have jurisdiction over it.⁶⁸ It also appears to be a general rule that an Act authorizing suits against the State, being in derogation of its sovereignty, must be construed strictly, and the privilege of suing restricted to those by whom it was clearly intended that it should be enjoyed,⁶⁹ and to such claims as are clearly comprehended by the Act.⁷⁰ The State may of course abrogate this prerogative, but the abrogation may be partial, it may prescribe the terms, and conditions on which it may be sued and even the manner in which the suit shall be conducted,⁷¹ and there will be no jurisdiction unless those terms and conditions are complied with and that manner conformed to.⁷² Thus where a Statute permits actions against a State on such claims as are presented to the auditor of public accounts, and in whole or in

⁶⁴ Delaware D. Co. v. Com, 100 Am. Dec. 570.
 Pennsylvania R. Co. v. Duquesne Borough, 46 Pa. St. 223.
⁶⁵ 43 N. Y. 399.
⁶⁶ Hunsaker v. Borden, 63 Am. Dec. 130.
 State Bank v. Hastings, 41 Am.

⁶⁸ Greene, Ex parte, 20 Ala. 52.
⁶⁹ Rose v. Governor, 24 Tex. 496.
⁷⁰ Chicago R. Co. v. State, 50 Wis.
⁷¹ De Haussure v. Gaillard, 127 U. S. 316.
⁷² Hledaer v. State, 64 N. Car. 391.
 Raymond v. State, 26 N. Car. 142.
 Clements v. State, 77 N. Car. 146.

part rejected, no claim that has not been so presented and rejected can be sued for.⁷³

It has also been held that the consent merely of an officer of the State, the attorney-general, for instance, by appearing and answering in the name of the state, does not bind it by the judgment or decree which may be the result of the suit.⁷⁴ The sovereign authority alone can authorize such suits,⁷⁵ and in the United States even a constitutional provision that suit may be brought against the State in such manner as the legislature thereof may direct does not compel the legislature to act; and until a statute has been passed agreeably to such provision, the State retains its immunity from suit.⁷⁶

It also appears to be held that a State may at any time withdraw its consent, and the withdrawal when made has the effect even of abating the suits pending at the time.⁷⁷ In the United States such withdrawal has been held valid in the face of the prohibition of the Federal Constitution against the impairment of the obligation of contracts.⁷⁸ In *Antony v. Greenhew*⁷⁹ the majority of the judges of the United Supreme Court said:—"If a State furnishes a remedy by process against itself or its officers, that process may be pursued because it has consented to submit itself to that extent to the jurisdiction of the courts, but if it chooses to withdraw its consent by a repeal of all remedies, it is restored to the immunity from suit which belongs to it as a political community responsible to no superior." Similarly in *State Ex parte*,⁸⁰ Breckell, C. J., said:—"Legal remedies or their efficacy in enforcing the obligation or liability are not contemplated as in cases of contracts between individuals. These are vain and useless against the state without the concurrence of the legislative power. Statutes are often passed permitting suits against the State. Such

7 N. L.

Horne v.

4 S. Car. 38 Car. 124
Adams v. Bradley, 5 Hawy (U.S.) 217
St. Paul R. Co. v. Brown, 24 Minn. 517
 4 Fed. Rep. 500.

v. Bank 3
State v. Sneed, 9 Baxt. 476
Horne v. State, 64 N

State v. Stout, 7 Neb.
 1 State 32 Ala. 231.

80 32 Ala 231

statutes are matters of grace, confer privileges, they do not create rights, and are always construed like other statutes conferring privileges or exemptions on the citizens. The power to withdraw is commensurate with the power to confer, and when the privilege is withdrawn, the citizen is remitted to the condition in which he stood when it was conferred."

In India, the Government, unlike the Crown, can be and is often sued, and this is so on account of the original trading character of the East India Company, who in course of time acquired the government of India—and from whom the Queen finally took over that government. The main object of 21 and 22 *Vic.* C. 106, was to transfer to Her Majesty the possession and government of the British territories in India, then vested in the East India Company in trust for the Crown, but it expressly provided for a continuance of both the nature and the extent of liabilities with which the revenues of India in the Company's hands were chargeable. However, as the Queen could not be sued, as the East India could have been, in her own courts, it was enacted by Sec. 65 that the "Secretary of State in Council should and might sue and be sued as a Body Corporate, and that all persons might have and take the same remedies and proceedings, legal and equitable, against the Secretary of State in Council as they could have done against the East India Company, and that the property and effects thereby vested in Her Majesty for the purposes of the government of India, or acquired for the said purposes, should be subject and liable to the same judgments and executions as they would, while vested in the Company, have been liable to, in respect of debts and liabilities lawfully contracted and incurred by the said Company." It may thus generally be laid down that the liability of the Secretary of State in Council to be sued depends on that of the East India Company. The Company could not be, and therefore the Secretary of State in Council cannot be, sued for all its acts.

The Company was established originally for the purposes of trade only, but in addition to its powers of carrying on trade, it after some time 'acquired also powers of quite a different character,' "a power to acquire, and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers

of India.”⁸¹ This statement of the Company’s powers was pronounced to be correct by their Lordships of the Privy Council in the *Secretary of State in Council for India v. Kamachee Boye Sahiba*,⁸² in which Lord Kingsdown, in delivering their Lordships’ judgment, said:—“That acts done in the execution of these sovereign powers were not subject to the control of the Municipal Courts, either of India or Great Britain, was sufficiently established by the cases of the *Nabob of Arcot v. The East India Company*,⁸³ in the Court of Chancery, in the year 1793; and the *East India Company v. Syed Ally*,⁸⁴ before the Privy Council in 1827. The subsequent Statute 3 & 4, Will. IV, C. 85, in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of sovereignty.” In *The East India Co. v. Syed Ally*, Sir John Leach, in delivering their Lordships’ judgment said:—“The East India Company, in the exercise of what they considered their right of sovereignty resumed the jaghir in question, and granted it to K. not in the form of the original grant to his father, but in terms totally different, being for life only. It is in effect the same thing, as an act of sovereignty, as if it had been granted to a mere stranger. The Supreme Court of Madras had no authority to question an act of sovereignty exercised on the part of the *East India Company*.”⁸⁵

The same view had been taken in other cases. In *Elphinstone v. Heerachund*,⁸⁶ it was held that an action would not lie for a seizure of property, when the proper character of the transaction was that of a hostile seizure, made, if not *flagrante*, yet *nondum cessante bello*. It may be difficult in some cases to determine whether an act is done in the exercise of powers, usually called sovereign powers, by individuals to whom such powers have been lawfully delegated. It is clear that the East India Company would not have been liable for any act done by any of its officers or soldiers in

⁸¹ Gibson

Company.

⁸² VII M. L. A. 476.
⁸³ 1 Ves. J. 371.⁸⁴ VII M. L. A. 535⁸⁵ VII M. L. A. 578.⁸⁶ 1 Knapp P. C. C. 316

carrying on hostilities, or for the act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was the property of an enemy, nor for any act done by a military or naval officer, or by any soldier or sailor, whilst engaged in military or naval duty, nor for any acts of any of its officers or servants in the exercise of judicial functions.

In fact, the immunity of the East India Company from the jurisdiction of ordinary courts in respect of acts of state was never denied, though there is a considerable conflict of opinion as to what acts are to be deemed as such, and therefore, beyond the cognizance of the judicial tribunals. The distinction between such acts, and those other acts for which the East India Company was liable, has been often discussed and explained both in England and this country. Their Lordships of the Privy Council appear to take a restricted view of an act of state, and to treat as such only those acts which do not profess to be justified by Municipal Law. It has been suggested against that view, that it is too vague, and that if that were the correct law the Government could easily secure immunity in the case of all wrongful acts by making no attempt at justification, and the worst and most unjustifiable acts would be the safest and furthest from the confines of the jurisdiction of judicial tribunals. The only qualification of the proposition suggested is that an act is deemed as of state only when and so far as it affects a foreign state or a subject of a foreign state. Mr. Justice Stephen in his *History of Criminal Law*" thus speaks of it "as an act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty, which act is done by any representative of Her Majesty's authority, Civil or Military, and is either previously sanctioned, or subsequently ratified by Her Majesty. . . . As between the sovereign and his subjects there can be no such thing as an act of state" This is quoted with approval by Sir Frederick Pollock in his *Work on Torts*," in which it is further said that an act of state, "on the whole appears to signify an act done or adopted by the prince or rulers of a foreign independent state in their political and sovereign capacity, and within

the limits of their *de facto* political sovereignty. . . . If we may generalize from the doctrine of our own courts, the result seems to be that an act done by the authority, previous or subsequent, of the Government of a sovereign state, in the exercise of *de facto* sovereignty, is not examinable at all in the courts of justice of any other state. So far forth as it affects persons not subject to the Government in question, it is not examinable in the ordinary courts of that state itself. If and so far as it affects a subject of the same state, it may be, and in England it is, examinable by the courts of their ordinary jurisdiction." This distinction does not appear to be borne out in its entirety even by the decisions of their Lordships of the Privy Council, and in *Salig Ram v. The Secretary of State for India*⁹¹ it was contended that the party affected by the act was a subject of the British Government, but apparently notice was not taken of that contention, and the act was held to be an act of state. It appears to be unanimously agreed upon that there are certain acts of the Crown, which the Municipal courts are debarred from taking cognizance of, and which affect the subjects of the state itself.

The leading decision on the point is that to which reference has already been made, and which is usually cited as the 'Tanjore case.'⁹² In that case, the cause of action was the seizure of the estates of the late Raja of Tanjore, and their Lordships held that it was without any ground of legal right, and that "the Raja was an independent Sovereign of territories undoubtedly small and bound by treaties to a powerful neighbour, which left him, practically, little power of free action ; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company ; nor does there appear to have been any pretence for claiming it on the death of the Raja without a son, by any legal title either as an escheat, or as *bona vacantia*. The seizure was therefore held to be an act of state and therefore beyond the jurisdiction of the Municipal Courts. This decision and the distinction referred to in it has been repeatedly followed both at their Lordships' Board⁹³ and by the courts

in India. In *Forester v. The Secretary of State for India*,⁹² the principle of the above decision of their Lordships was approved, but the seizure of the estates of Begum Sumroo, the cause of action in that suit, was held not to be an act of state, and therefore, cognizable by the Municipal Courts. Their Lordships said: "The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another Sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure." This distinction was referred to by the Bombay High Court in *Hari Sadashiv v. Shaik Azmudin*⁹³ in which it was observed that the status of waikars was merely that of powerful *saranjamdars* subordinate to the Raja of Satara and similar to that of Begum Sumroo, and it was pointed out that in *The Secretary of State for India in Council v. Narayan Balvant Bhosle*,⁹⁴ the Government were dealing with the Raja of Satara, who was an independent sovereign. That distinction was again explained in *Salig Ram v. The Secretary of State for India*,⁹⁵ in which their Lordships referred to the sovereign status of the last King of Delhi and to the circumstance that the seizure and confiscation of his property after the mutiny of 1857 were acts of absolute power, and not acts done under color of any legal right, of which a Municipal Court could take cognizance, and said: "The seizure of the royal fargool villages for the reasons above given does not fall within the ruling of *Forester v. The Secretary of State for India*, but is governed by the principles laid down in *The Secretary of State in Council v. Kamachee Boye Sahaba*, *The East India Company v. Syed Ally*, and in other cases in which the same principle is affirmed."

In regard to another class of cases, reference may be made to the case of *Moodeley v. The East India Company*,⁹⁶ in which Lord Kenyon said: "I admit that no suit will lie in this court against a sovereign power for anything done in that capacity, but I do not think the East India Company is within the rule. They have rights as a sovereign power;

⁹² L. R. I. A. Sup. 10.

⁹³ I. L. R., X I. Bom. 235.

⁹⁴ 1863 Bom. P. J., 244.

⁹⁵ L. R. I. A. Sup. 110.

⁹⁶ 1784 100 E. 100.

they have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here: so in this case as a private company they have entered into a private contract, to which they must be liable. Here is a *prima facie* ground of action: the company has put other persons in the way of doing the plaintiffs an injury." In *Sheo Lall v. Shaik Mohomed*,⁹⁷ the suit was for the possession of certain land purchased from the Government after its confiscation on rebellion, and their Lordships of the Privy Council in overruling the contention as to the want of jurisdiction, said: "The meaning of an act of state is something which appertains to the functions of Government. Suppose, for instance, any question had arisen with regard to the propriety of confiscating the rebel's property, that would have been an act of state. Probably the determination of the Government to sell that confiscated property might also be treated as an act of state, but in the sale the Government was exactly in the situation of an individual selling his property by auction." The Calcutta Supreme Court held the same in *Peninsular O.S.N Co. v. The Secretary of State in Council*,⁹⁸ and Sir Barnes Peacock, C.J., in delivering the judgment of the Court, said: "In determining the liability of the East India Company to be sued in any case, the general principle applicable to sovereigns and states, and the reasoning deduced from the maxim of the English Law that the king can do no wrong would have no force. We concur entirely in the opinion expressed by Chief Justice Grey in the case of *The Bank of Bengal v. The East India Company*,"⁹⁹ that the fact of the Company's having been invested with powers, usually called sovereign powers did not constitute them sovereigns. This is clear from the recital in the 53rd George III. C. 155, by which the territories then in the possession and under the Government of the East India Company, with the revenues thereof, were vested in them for a further term, without prejudice to the undoubted sovereignty of the Crown in and over the same, or to any claim of the said Company to any rights, franchises or immunities. . . . We are of opinion that the East India Company were not sovereigns, and, therefore, could not claim all the exemption of a sovereign; and that

⁹⁷ XIII. W. R. P. C. 4.
⁹⁸ V. B. H. C. R. App. 9.

| ⁹⁹ Bignell Rep. 120.

they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons, but they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers by which we mean, powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."

The principle of this decision was carried further the other way in *Nobin Chunder Dutt v. The Secretary of State for India*,¹⁰⁰ in which Garth, C. J., said: "The persons who are said to have been guilty of the acts and default of which he (plaintiff) complains, are the officers employed in that department of the Government service which relates to the imposition and collection of the excise duties. The ground of the complaint is that these officers have been guilty of various breaches of duty in not fulfilling obligations to the plaintiff which they were bound to fulfil in that capacity. Now it is impossible to doubt for a moment that the laws which are made in this or any other country for the taxation of the subject by the imposition of customs and duties, are laws which can only be made or enforced in the exercise of sovereign powers properly so called; and these sales, at which the plaintiff contends that he purchased the rights on which he claims, only constitute a portion of the machinery and arrangement by which the imposition and collection of the excise duties are regulated in this country. His claim is therefore clearly one of those which cannot be enforced against the Government of India." The actual decision of the Supreme Court was distinguished by the Chief Justice on the

ground that in that case “the negligence complained of was an act done by their (the Government’s) servants in carrying on the ordinary business of shipbuilders (unconnected altogether with the exercise of sovereign powers), and which any firm or individual might have carried on for the same purposes.”

The Madras High Court has taken a different view of an act of state for the purposes of the immunity of the East India Company from the jurisdiction of the Courts. In the *Secretary of State for India v. Hari Bhanjee*,¹ Sir Charles Turner in delivering the judgment of the Madras High Court after referring to the decision of the Calcutta Supreme Court and to the distinction made in that case between acts done in the exercise of powers usually termed sovereign, and acts done in the conduct of undertakings which might be carried on by persons who enjoyed no delegated powers of sovereignty, said, “The Court held that exemption from suit could not be claimed in respect of the latter class of acts and expressed no opinion that all acts of the former class would enjoy such immunity, and in *Nobin Chunder Dey’s case* it has been ruled that the liability of the Government or of its officers to suit is restricted to acts of the latter class. It appears to us that this position cannot be maintained, and that the decided cases show that in the class of acts which are competent to the Government and not to any private person, a distinction taken is between those which lie outside the province of municipal law and those which fall within that law, and that it is of the former only that in this country the Municipal Courts in British India cannot take cognizance. Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties obviously do not fall within the province of municipal law, and although in the administration of domestic affairs the Government ordinarily exercises powers which are regulated by that law, yet there are cases in which the supreme necessity of providing for the public safety compels the Government to acts which do not pretend to justify themselves by any canon of municipal law. For the exercise of these powers the Government, though irresponsible to the courts is not wholly without responsibility. Under the Constitution of England it is more or less responsible to Parliament through the responsible ministers of the Crown. Acts thus done in the exercise of sovereign powers but

which do not profess to be justified by municipal law are what we understand to be the acts of State of which Municipal Courts are not authorized to take cognizance The Tanjore case is an authority for the position that where the act which is the ground of complaint is an act which professes to be done under the sanction of municipal law and in the exercise of powers conferred by that law, the circumstance that it is an act done by the sovereign power or by the deputy of that power does not oust the jurisdiction of the Civil Courts. That the parties to the act then in question could claim such protection as was afforded by the status of sovereignty was not disputed, and the question on which the decision turned was whether the act affected to justify itself on grounds of municipal law, or whether it was in whole or in part a possession taken by the Crown under color of legal title, and in the latter case, the Committee determined that the defence of absence of jurisdiction had no foundation. . . . If the decision (*Forester v. Secretary of State*) on which the Government relies is correct, then it was obviously unnecessary for the Privy Council in *Forester's case* to have inquired into the title of the Begum, for the resumption of her jagir was an act which could, under no circumstances, have been legally done by a private person—it was an act of the Government done in the exercise of administrative powers, but because it professed to be done under the sanction of municipal law it was examinable by the Municipal Courts. The cases we have cited appear to us to afford a sufficiently clear indication of the sense in which the term ‘act of state’ is to be understood in the rule which restricts the jurisdiction of Civil Courts. In the case before us, the demand of which the respondents complained was levied by the Collector acting as he believed under the authority of municipal law.”

This decision was followed by a Full Bench of the same High Court in *Vijaya Ragava v. Secretary of State for India*, in which Kernan, J., said that in that case “the character of the act in respect of which relief against the Secretary of State might be maintained was considered, and after referring to all the authorities, it was held that the East India Company were liable for negligence or misconduct of its officers.

in cases in which the sovereign would not have been liable on a petition of right, and it is pointed out that the Company were liable to suits in the Court of the Sovereign, and that they also submitted to the jurisdiction of their own Courts. It was held in that case that where an act complained of is professedly done under the sanction of municipal law, and in the exercise of power conferred by that law, the fact that it is done by the sovereign power, and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the Civil Courts."

This view is to some extent borne out also by the provisions of several Acts specially passed by the Indian Legislature for exempting from the jurisdiction of Civil Courts various acts of executive and revenue officers done in the discharge of the work of the administration. Several instances of such general exemption have been mentioned in the above Chapter . A very notable instance of it is contained in Act IX of 1859 relating to the claims to property seized as forfeited." The exemption in some cases extends only to certain courts or classes of courts. Thus Sec. 32 of the Bombay Civil Courts Act, as amended by Sec. 15 of the Bombay Revenue Jurisdiction Act, 1876, provides that "no Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party, but in every such case, such judge or court shall refer the plaintiff to the District Judge, in whose court alone, subject to the provisions of Sec. 19, such suit shall be instituted."

a Secs. 18 and 20 of the Act provide: "Whenever any property shall have been attached or seized without either conviction or an adjudication of forfeiture by any officer of Government, as property forfeited or liable to be forfeited to Government for an offence for which, upon conviction, the property of the offender would be forfeited, the validity of such attachment or seizure shall not be called in question by any Court or other authority in any suit or proceeding, unless the offender or alleged offender shall, within one year after the seizure of his property, have surrendered himself for trial, and upon trial before a competent Court shall have been or shall be acquitted of the offence, and shall prove to the satisfaction of the Court that he did not escape or keep out of the way for the purpose of evading justice. Nothing in this section shall extend to persons entitled to pardon upon Her Majesty's Proclamation, published in the *Calcutta Gazette Extraordinary*, dated the 1st of November 1858, or to any person who, having surrendered himself within the period of one year after the seizure of his property, shall be discharged by order of Government without a prosecution. . . . Nothing in this Act shall be held to affect the right of parties not charged with any offence for which, upon conviction, the property of the offender is forfeited in respect of any property attached or seized as forfeited or liable to be forfeited to Government; provided that no suit brought by any party in respect of such property shall be entertained it be instituted within the period of one year from the date of the attachment or of the property to which the suit relates."

158. As a general rule, courts of every State have jurisdiction over all the persons present in the State at the time of the institution of the suit, whether their presence is temporary or permanent. This jurisdiction in the case of temporarily present foreigners is recognized by all the writers on International Law,⁵ as well as by the Courts.⁶ In *Peabody v. Hamilton*,⁷ both the parties were aliens, but the Massachusetts Supreme Court held, that a personal action of a transitory nature might be maintained, if the defendant be personally served with process, although the service be made on board of a foreign vessel before its mooring at the wharf. The same view has been taken in *Alley v. Caspari*,⁸ in which Peters, C. J., said—"The true interpretation of the principle is, that when an alien or non-resident is personally present in any place in the State, however temporarily or transiently in such place, whether abiding, visiting, or travelling at the time, a process duly served upon him will confer complete jurisdiction over his person in our Courts." And this jurisdiction may be exercised, even though the defendant's property is beyond the reach of the Court,⁹ or the subject-matter of the action occurred in another State.⁸ The Civil Procedure Code contemplates the service of a summons on a defendant outside British India, but it does not contain any provisions as to the cases in which a suit can lie against foreigners, and the Courts can take cognizance of such cases only when allowed by the general principles of International Law. There is a class of persons, however, who though actually within a State, are, in contemplation of law, not so within it as to be subject to the jurisdiction of its Courts, because their presence is as that of the representatives of some other sovereignty. On this principle, it has sometimes even been held, that ambassadors and other public ministers and consuls and vice-consuls of foreign nations, whether served with process or not, may, at any time, even after appearance in court and a trial upon the merits, avoid a judgment against them, by showing their official capacity.⁹

⁵ Sto. Conf. Laws 581.

Whar. Conf. Laws 742.

⁶ Hale v. Lawrence, 47 Am. Dec. 160.

Molynaux v. Seymour P. & Co., 76 Am. Dec. 69.

Barrell v. Benjamin, 16 Mass. 354.

Roberts v. Knights, 7 Allen, 449.

⁷ 186 Mass. 217.

178.

⁸ Bunch, 22 Am. Dec.

⁹ Hale v. Lawrence, 47 Am. Dec.

⁹ Miller v. Van Loden Belt, 66 Cal. 341.

Bora v. Preston, 111 U. S. 236.

United States v. Bonner, 1 Bald. 377.

United States v. Lafontaine, 4 C. C. 173.

Some nations, indeed, entirely refuse to take cognizance of controversies between foreigners, remitting them, especially as to matters originating in foreign countries, for redress to the tribunals of their own or of the defendant's country. Thus in France, with few exceptions, the tribunals do not take cognizance of controversies between foreigners respecting personal rights and interests.¹⁰ But this is a result of their special ideas of policy and convenience, and not required by International law. In England and America, as well as in India, suits are maintainable, and constantly maintained, between foreigners, when either of them is within the territory of the State in which the suit is brought.¹¹ Mr. Pigott lays it down as a general rule, that "a judgment pronounced against a defendant resident in the State at the time of service of the writ is good, and will in virtue of the general theory, be enforced by the Courts of another country, when the proper procedure for bringing it before them is put in motion."¹² Similarly, Brett, J., in *Jackson v. Spittall*¹³ said: "That the superior Courts of England did not decline jurisdiction in the case of any transitory cause of action, whether between British subjects or foreigners, resident at home or abroad, or whether any or every fact necessary to be proved in order to establish either the plaintiff's or the defendant's case arose at home or abroad. Though every fact rose abroad, and the dispute was between foreigners, yet the Courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him when present in England." This proposition is important, "because the converse is equally true, that with the cessation of residence or the absence from the territory, comes a cessation of this necessity for obedience to the writ of summons, even in the case of subjects of the country."¹⁴ As a necessary consequence of this rule, if it stood alone, a subject-debtor, would, by leaving the country before the institution of a suit, be able to evade the jurisdiction of the courts; and when out of the kingdom could not be brought before its courts even for debts contracted there. A person after contracting a debt during temporary residence in a country would, by leaving it before a writ could

be served upon him, be completely free; and commercial debts, contracted without even this temporary residence, could not by any means be adjusted by the tribunals of either country.¹¹ To remedy this inconvenience, a jurisdiction is generally assumed even over persons residing or present in another state and this assumed jurisdiction being accepted by all nations has become a part of international law, though there is no unanimity as to its extent or to the cases in which it may be applied. Mr. Pigott believes¹²—"that absent subjects may in all cases be cited; and in some countries this rule is extended so as to include absent though domiciled aliens." In England, Order XI, Rule 1 (c), provides that a writ of summons may be permitted to be served outside the jurisdiction when "any relief is sought against any person domiciled or ordinarily resident within the jurisdiction." In *Douglas v. Forrest*,¹³ Best, C. J., said—"A natural-born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation." Blackburn, J., in *Schibsby v. Westenholz*,¹⁴ said: "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."

This rule admits of a still further extension in regard to foreign shareholders in incorporated companies in the state. Thus in *Bank of Australasia v. Harding*,¹⁵ it was held that the members resident in England of a company formed for the purpose of carrying on business in a place out of England would be bound in respect of the transactions of that company by the law of the country in which the business is carried on. The question in that case was as to the liability of a shareholder in an action on a judgment obtained in the colony against

Pig. For. Jud 132
Pig. For. Jud 135.
4 Bing 702

| 15 L. R. 6 Q. B. 161
| 16 91 B 601

the chairman or principal officer, who under the Colonial Act was liable instead of all the members. The defence was that the defendant was not resident in the colony, and had no notice or knowledge of the proceedings, but it was overruled, and Cresswell, J., said: The defendant was a member of a company who must be taken to have been a consenting party to the passing of the Colonial Act. He must therefore, be regarded as having agreed that suits upon contracts entered into by the Company might be brought against the chairman, and that the chairman should, for all purposes represent him in such actions." This decision was followed in *Copin v. Adamson*,¹⁰ in which Kelly, C. B., said: "I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby a member of that company—such company existing in a foreign country, and subject in all things to the law of that country—himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the laws of that country in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively, and if that company, by the law of the country in which it exists, or by the articles of its constitution, is subject to the jurisdiction of a particular court within that country, so also is each shareholder or member subject to its jurisdiction in all cases in relation to or connected with such company." Amphlett, B., further said: "A man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision." The decision in the case was affirmed on appeal."

159. Mr. Pigott says that the true rule as to persons Courts cannot acquire outside the jurisdiction is: "That a State jurisdiction over foreigners not present in has discretion vested in it to declare in what cases absent defendants whether

§. 159.] NO JURISDICTION OVER FOREIGNERS BY SERVICE OF PROCESS.

be
on them. its Courts; that all States having that discretion vested in them, all other States will recognize the due exercise of it, and enforce a judgment delivered in accordance with it, even though it be against one of their own subjects. This rule conflicts with the maxim *Actor sequitur forum rei*, but that maxim can no longer be said to exist in its integrity, for every country has introduced exceptions to it."³⁸ In *Bikrama Singh v. Bir Singh*,³⁹ Plowden, J., likewise said—"There is certainly, so far as I can ascertain, no rule of international jurisprudence universally recognized that a Municipal Court is absolutely incompetent to exercise jurisdiction over a non-resident foreigner, and it is certain that in many, if not in most, countries, the Municipal law authorizes the exercise of jurisdiction in such cases by its own courts, subject, generally speaking, to the condition that notice actual or constructive be given to the absent defendant. For instance, the Code of Civil Procedure expressly enacts in Sec. 10 that no person shall, by reason of his descent or place of birth, be in any civil proceedings exempt from the jurisdiction of any of the courts, and in Sec. 89 provides for service of summons outside the jurisdiction, while Sec. 17 authorizes the court to take cognizance of certain suits when the cause of action has arisen within the jurisdiction." It appears to be generally agreed upon, however, that even the personal service of a summons on a non-resident foreigner defendant at his foreign domicile can create no jurisdiction, so as to render the judgment enforceable in the courts of any other State. Mr. Black says—"It is sometimes attempted to obtain jurisdiction of a non-resident foreigner by the personal service of process upon him at his domicile. This, however, is admitted on all sides to be ineffectual. It can have no greater force or virtue than a purely constructive service."⁴⁰ It has been held in several cases that a personal judgment which a Court may render against one who is not a citizen of the State, nor served with process within its borders, no matter what the mode of service, is void, because the court has no jurisdiction over his person.⁴¹ "No sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exercise of authority

³⁸ Pag. For. Jud. 157.

³⁹ 1880 P. B. No. 191. p.

⁴⁰ Bl. Jud.

⁴¹ *Hart v. Hanson*, 110 U. S. 151

Martin v. Cobb, 77 Tex.

Eliot v. McCormick, 144

v. Daniell, 23 Pac. B.

of this sort, beyond this limit, is a nullity. . . . A citizen of one state or country cannot be compelled to go into another state or country to litigate a civil action by means of process served in his own state or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated."⁴² "The courts of a state," said Mr. Justice Story, in *Picquet v. Swan*,⁴³ "however general may be their jurisdiction, are necessarily confined to the territorial limits of the State. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty not justified or acknowledged by the law of nations."

In *De Meli v. De Meli*,⁴⁴ Bradley J., said:—"A party whose domicile is in a country is subject to its laws; and jurisdiction of his person, as well as of the subject-matter, may be acquired by the Court by means of substituted service in the manner provided, if provision for such purpose is made by its laws, although the party sought to be charged by an action brought against him is then absent from the country, and cannot be personally served with process within it."⁴⁵ But a Court has no extra-territorial jurisdiction, and a person not domiciled in the state or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it, or voluntarily submits himself to the jurisdiction of its Court by appearing in some manner in the action or proceeding sought to be instituted against him."⁴⁶ In *Jones v. Jones*⁴⁷ Andrews, J., said: "It must be conceded at the outset that the service of the citation upon the defendant here, who at the time was a resident and citizen of New York, owing no allegiance to the State of Texas, was utterly void and ineffectual as a means of giving the courts of Texas jurisdiction of the defendant. The processes of Courts run only within the jurisdiction which issues them. They cannot be served without the jurisdiction, and Courts of one state cannot acquire jurisdiction over the citizens of another state, under statutes which authorize a substituted service, or which provide

⁴² 39 How. 512.
on appeal 31 N. E. R. 734.
Mellman v. Zimmer, 31 Am. Rep. 232.
Smith v. Grady, 31 N. W. R. 477.
⁴³ 5 Mason, 35.
⁴⁴ 17 Am.

⁴⁵ Hunt v. Hunt, 36 Am. Rep.
Huntley v. Baker, 33 Hun. 578.
⁴⁶ People v. Baker, 32 Am. Rep. 274.
Ableman v. Booth, 21 How. 506.
Bischoff v. Weathered, 9 Wall. 512.
Halsion's Appeal, 93 Pa. St. 138.
⁴⁷ 2 Am. St.

for actual service of notice without the jurisdiction so as to authorize a judgment *in personam* against the party proceeded against. This question has recently been considered in several cases in this State, with a fulness of argument and illustration which leaves nothing to be said, and it is sufficient to refer to the decisions: *Kerr v. Kerr*; ⁴⁸ *Hoffman v. Hoffman*; ⁴⁹ *Hunt v. Hunt*; ⁵⁰ *People v. Baker*; ⁵¹ *O'Dea v. O'Dea*.⁵² It cannot be doubted, therefore, that the Texas Court did not acquire jurisdiction of the defendant in the action by the service of the citation here, or that, if the defendant had remained silent, taking no notice of the proceeding, no valid judgment could have been rendered against him." Incidental observations, apparently, to the contrary may be met with in some cases,⁵³ but they have no reference to foreigners in other countries, but either to persons subject to or domiciled in the country itself and casually staying in other countries, or to persons subject to or domiciled in other countries and casually staying in the country itself. This distinction as to the mode of serving process has application to those classes of persons; as while jurisdiction may be acquired over the former even by a constructive service, personal service of the summons is considered necessary to give jurisdiction over the latter. This distinction is justified on the ground, that in the former case the defendant being subject to and bound by the laws of the country is considered bound by any constructive service of the summons authorized by those laws.⁵⁴ Foreigners, however, are not bound by those laws except while present in the State, and it is contended that the courts of other countries, and especially of the country of which they are subjects

i A judgment obtained in a court of one State cannot be enforced in the court and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered, and enforced there even against the property, effects, and credits of a non-resident defendant there situated, but it cannot be enforced or made the foundation of an action in another State. A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the State where the judgment is rendered, but upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them, when they had no opportunity of being heard, its validity beyond that state is denied.⁵⁴

⁴⁸ 41 N. Y. 272.

⁴⁹ 7 Am. Rep. 209.

⁵⁰ 28 Am. Rep. 129.

⁵¹ 32 Am. Rep. 274.

⁵² 101 N. Y. 23.

⁵³ *Herm. Comm.* 612.

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Co. v. French, 19

v. Hunt, 28 Am. Rep. 129.

Ly v. Lorch, 53 How. 109.

Henderson v. Stanford, 7 Am. Rep. 521.

and in which they are domiciled, will not give effect to judgments against them unless they received an actual notice in proper time to be able to defend the suit. When in any country in accordance with its laws, a summons is served constructively by posting at the door of the court or any other public place, "there is no pretence to say that such modes of proceeding can confer any legitimate jurisdiction over foreigners who are non-residents, and do not appear to answer the suit, whether they have notice of the suit or not. The effects of all such proceedings are purely local, and elsewhere they will be held to be mere nullities."⁵⁵

Dr. Bigelow speaking of the rule of the American Courts, says⁵⁶—"If, the defendant is a citizen or resident of the state of the *forum*, he will be bound by the laws of that state concerning the mode of acquiring jurisdiction over him; if not, jurisdiction can be obtained over him, so as to make the judgment available for any purpose other than the appropriation of property of his actually levied upon, only by personal service of process upon him within the state of the *forum*, lawfully made, or by his voluntary and general appearance." It has often been held that a judgment can have the conclusive effect of a judgment *in personam*, only if the process is personally served upon the defendant, while he is within the jurisdiction of the sovereignty under which the court acts,⁵⁷ for no sovereign has the right to issue such notice to the citizen of another state or country, and thereby draw the party from his own proper forum *ad aliam examere*.⁵⁸ A decree *in personam* merely can only be supported, against a person who is not a citizen or resident of the state in which it is rendered, by actual service upon him within its jurisdiction, and constructive service by publication in a newspaper is not sufficient. The courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another Government will recognize a merely constructive service as bringing the person within the jurisdiction of the court.⁵⁹ The Supreme Court of Vermont laid down in a case—"That to the extent that the judgment was satisfied by the property attached, the proceeding would bar a recovery in this action. To that extent the judgment there is available here in behalf of the defendants, the same as a

⁵⁵ Bio-Conf.

⁵⁶ e. Westenholz, L. R. 6 Q. B. 157.

⁵⁷ Blackett v. Wethered, 9 Wall. 812.

⁵⁸ Big. Ketop 41

⁵⁹ Rogers v. Odell, 30 N. H. 457.

Lapham v. Briggs, 27 Vt. 26.

⁵⁶ Herm. Comm. 619.

⁵⁷ Hart v. Sanson, 110 U. S. 161.

payment would be. That is, that judgment is conclusive between the parties as to the property of the defendants there attached and appropriated to its satisfaction, but beyond that, and as a judgment *in personam*, we think it is a nullity. The court, having no jurisdiction of the defendants had no power to adjudge as against them upon the amount of the plaintiff's claim, no power to pass upon the defendants' personal rights and obligations; therefore a judgment in form against them, as an incident of the proceeding against the property attached, could not operate as a merger of the original claim."⁶¹

160. The presence in a country of a person's property does not confer on the courts of that country jurisdiction over that person. Dr. Story observes,⁶² that the presence of property within a country does not make the owner generally a subject of the sovereign of that country; and that

Presence of a non-resident foreigner's property in a country does not give its Courts jurisdiction over him.

whether the property attached in a country is tangible or debts due by persons there to non-resident persons, for all the purposes of the suit, its existence within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the judgment. But if the defendant has never appeared and contested the suit, it is to be treated to all intents and purposes as a mere proceeding *in rem*, and not as personally binding on the party as a judgment *in personam*; or, in other words, it only binds the property seized or attached in the suit, to the extent thereof, and is in no just sense a decree or judgment binding upon him beyond that property.⁶³ In other countries it is uniformly so treated, and is justly considered as having no extra-territorial force or obligation.⁶⁴ Dr. Bigelow in his notes in the eighth edition⁶⁵ of Story's Conflict of Laws says—"If jurisdiction was obtained against a non-resident by attachment of his property only, the judgment rendered thereon will have no extra-territorial effect further than to bind the property attached and disposed of." Indeed the judgment is of no further avail even in the State in which it was rendered. No general execution can be issued for any balance unpaid after the attached property is exhausted, and no suit can be maintained on the judgment in the same or any other Court."⁶⁶

⁶¹ *Filds, Herm. Comm.* 626.

⁶² *Sto-Conf. Laws*, 770.

⁶³ *Galpin v. Page*, 15 Wall, 350.

⁶⁴ *Sto-Conf. Laws*, 765.

⁶⁶ *Leoder v. Reynolds*, 10 Wall, 398.

Similarly Dr. Herman says :⁶⁸—“ Where a party is within a territory, he may justly be subjected to its process and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him. Such judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*.⁶⁹” It has been repeatedly held by the American courts, that the jurisdiction of the courts of a country over a non-resident foreigner’s property within its limits authorizing its seizure and sale according to its laws,⁷⁰ and even its attachment by the said courts,⁷¹ will not give them jurisdiction over that foreigner, and a judgment rendered against him will be effectual only as a judgment *in rem*, acting upon such property as he may have within the jurisdiction. The Courts of the country in which the property is situate may subject it to the payment of debts, but have no power to conclude the owner’s claim thereto by a judgment not *in rem*, and not founded on voluntary appearance.⁷² Chief Justice Parsons in *Bissell v. Briggs*,⁷³ said : “ It may be remarked that a debtor, living in Massachussets, may have goods, effects, or credits in New Hampshire, where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that State, in the hands of the bailiff, factor, trustee, or garnishee of his debtor, and on recovering judgment, those goods, effects and credits may lawfully be applied to satisfy the judgment. If, however, those goods, effects, and credits are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment in this State to obtain satisfaction, he must fail; because the defendant was not personally amenable to the jurisdiction of the Court rendering the judgment. And if the defendant, after the service of the process of foreign attachment, should either in person have gone into the State of New Hampshire, or constituted an attorney to defend the suit, so as to protect his

⁶⁸ Herm.
⁶⁹ *Priguet v. Swan*, Mass. 43
⁷⁰ *McV*, 50 Am.
⁷¹

⁷² *Albee*, 54 Am.
⁷³ *v. Bank of*

goods, effects, or credits from the effect of the attachment, he would not thereby have given the court jurisdiction of his person; since this jurisdiction must result from the service of the foreign attachment. It would be unreasonable to oblige any man living in one State, and having effects in another State, to make himself amenable to the Courts of the last State, that he might defend his property there attached." The United States Supreme Court in *Hall v. Lanning*⁷⁵ even held that "in a suit against a partnership, if one partner is not within the jurisdiction of the Court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction, even though by the *lex loci* a service on the partner resident within the jurisdiction is sufficient to authorize a judgment against all the partners." Mr. Freeman says: "If a partnership is doing business in a state or country of which some of its members are non-residents, there is no doubt that upon service of process upon the resident defendants, a judgment may be entered which will bind them personally and be enforceable against the partnership assets found within the jurisdiction of the Court."⁷⁶

The same view has been finally taken in England also.⁷⁸ Mr. Pigott says that the rule of territorial jurisdiction "in no wise over-rides nor forms any extension of the rule of residential jurisdiction, and the owners of property therefore are not on account of the property amenable in any suit instituted against them by residents; although, if the suit, once begun against them when temporarily resident, terminate adversely, this property will be taken in execution."⁷⁹ Blackburn, J., in *Schibsby v. Westenholz*,⁸⁰ said:—"We doubt very much whether the possession of property locally situated in the country and protected by its laws makes the possessor bound; it should rather seem that whilst every tribunal may very properly execute process against the property within its jurisdiction, existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment."

Mr. Burge says that the jurisdiction over the defendant may be acquired "in respect of his being possessed of some estate or subject within it *ratione rei sitæ*, or on the arrestment made by the decree of the Court of the party's moveable effects, *arrestum*

⁷⁵ 21 U. S. 101.

⁷⁶ *Winters v. Meigs* 11 Am. St. Rep. 440.
Gulzberg v. Jacobson, 40 Mich. 53.

⁷⁷ Fr. Jud. 122.

⁷⁸ *The Moxa* 6 F. D. 146.

⁷⁹ 12 F. & F. Jud. 137.

⁸⁰ L. R. 6 Q. B. 155.

In *Nallatambi Mudaliar v. Ponnusami*,⁸¹ Sir Charles Turner, C. J., and Muttusami Ayyar, J., said that they could find “no principle for holding that the mere possession of property in the foreign country would, by reason of the protection enjoyed, confer on the courts of that country jurisdiction over a foreigner, neither domiciled nor resident therein, in respect of matters unconnected with the property.”

161. For the competency of the jurisdiction of a court, it is further necessary that there should be subjective personal jurisdiction also, that the individual judge presiding over the court should not be personally disqualified from trying the suit or other civil proceeding as the case may be. The disqualification of the judge in regard to the cognizance of the suits in which, or in the result of which, he has any personal interest is often held to divest the court of its jurisdiction over the said suits. This disqualification is expressly provided for by the Legislature in regard to some of the Provinces in British India. Thus the Bengal, North-Western Provinces, and Assam Civil Courts Act, 1887, broadly enacts⁸² that the presiding officer of a Civil Court shall not try any suit or other proceeding to which he is a party or in which he is personally interested. There are similar provisions in the Madras Civil Courts Act,⁸³ and the Oudh Civil Courts Act also.⁸⁴ The principle, however, is of a general application, and in force even in countries where it has not been embodied in any legislative enactment.

Nemo debet esse iudex in propria causa, was a familiar maxim among the Romans. “It is against reason,” says Littleton, “that if wrong be done to any man, he thereof should be his own Judge.” It was enacted in as early as the reign of Henry VI, that a Justice

of the Peace exercising his office in his own case should be punished. A member of Town Council who has taken part in the resolution for prosecuting any one cannot sit over him in justice, and in case of his sitting, the conviction will be void,⁸⁶ even if he does not really take any part in the proceedings until the other Justices determine on the conviction.⁸⁷ In *Q. v. Justices of Great Yarmouth*,⁸⁸ the chairman of the Magistrates, who was himself an appellant in one of the cases for hearing, took part in the decision of all the cases except his own, and the Court held that he, being a litigant in a matter similar to the other matters before the Court, was disqualified from acting as a Justice in those other matters also, and that the orders passed on them were void. Field, J., in his decision in the case said: "It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation or having a direct or indirect motive for desiring a particular decision to be come to should abstain from putting himself in such a position as that, unconsciously to himself, a bias due to the administration of justice might take possession of his mind Had this been a matter, such, for instance, as an assault, or something having no common ground with the other cases, the fact that the Mayor was going to conduct such a case would have had no bearing on the decisions in the other cases. Here, however, there was a common feature in all the cases, namely, that to arrive at the rateable value in each of the six cases the same elements of value had to be considered, for these houses were all in the occupation of the owners."

It has been repeatedly held that any pecuniary interest, however small, in the subject-matter is sufficient to create the disqualification. The interest must however be real, and the mere possibility of bias in favor of one of the parties does not *ipso facto* avoid the Judge's decision. In *Q. v. Rand*,⁸⁹ the Corporation of B. were the owners of water-works, and were empowered by statute to take the water of certain streams without the mill-owners' permission, on obtaining a certain certificate of Justices, who granted the same notwithstanding an objection from the owners. Two of the Justices were trustees of certain institutions that had lent money to the Corporation on bonds charging the corporate fund. Neither of the Justices

⁸⁶ *Q. v. Meyer*, 1 Q. B. D. 178.
⁸⁷ 4 Q. B. D. 332.

⁸⁸ 1 L. R. 1 Q. B.

could by any possibility have any pecuniary interest in those bonds, but the security of their *cestuis que trust* would indirectly produce that effect, as increasing the value of the water-works, and this interest was considered to be not sufficient to disqualify their acting in the granting of the certificate. The interest to disqualify must be direct and certain, and not merely remote or contingent. Blackburn, J., in delivering the judgment of the Queen's Bench Division said: "If by any possibility these gentlemen, though mere trustees, could have been liable to costs or to any other pecuniary loss or gain, in consequence of their being so, we should have the question different from what it is; for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favor those for whom they were trustees, and that is an objection not in the nature of interest, but of a challenge to the favor. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favor of one of the parties, it would be very wrong in him to act." In *Q. v. Manchester S. and L. R. Co.*,⁹⁰ there was, at the time of the summoning of a jury and the taking of an inquisition before the sheriff as to the amount of compensation payable for land taken by a Railway Company, an executory agreement not yet carried out, by which that Company would ultimately become amalgamated with another Railway Company, and the sheriff was a share-holder in the latter Company, his interest was held not to disqualify him. In *Q. v. Farrant*⁹¹ it was admitted that if a Magistrate had such a substantial interest other than pecuniary in the subject-matter of the litigation as to make it likely that he will have a bias, he would be disqualified, but it was held that the mere fact of his being a witness in the cause did not necessarily disqualify him. In *Serjeant v. Dale*⁹² it was actually laid down that if a Magistrate had any legal interest in the decision of a case, he would be disqualified from trying it, no matter how small that interest might be; Mellor and Lush, J.J., pointing out that "the law in laying down this strict rule had regard, not so much perhaps to the motive which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties." This was quoted with approval in this country in *Girish Chunder Ghose v. The*⁹³ *reass⁹⁴* in which Trevelyan and Rampini, J.J., said :

“ In this case it is clear that the District Magistrate from first to last was the prosecutor. He initiated and directed the whole proceedings. He may also, we think, be said to have been personally interested in them, for the word ‘ personally ’ in Sec. 555 does not, we think, mean merely ‘ privately interested ’ or ‘ interested as a private individual,’ but includes such an interest as the District Magistrate must in this case have had in the conviction of the accused (see the case of *In re Het Lall Roy*⁹⁵). Secondly, the Magistrate in the passage from his judgment, which has been read, and in other passages—for instance, in those in which he describes the locality in which the unlawful assembly took place—has described matter which came under his own observation. He therefore has embodied in his judgment matters which, if relevant, should have been deposed to by him on oath in the witness-box. Now, it is clear, that no Magistrate can try a case in which he is himself a witness. The rule laid down in *Empress v. Donnelly*⁹⁶ and many other rulings, is that a Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. The Magistrate in a letter which has been read to us states that he only witnessed the facts deposed to by the witnesses from a distance, and it has been said that his evidence could not have materially affected the result of the case. But this appears to us to be immaterial. The accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence, and which they had no opportunity of testing by cross-examination and of rebutting (see the case of *In re Hurro Chunder Paul*⁹⁷)

The same general principle is recognized and acted upon in the American courts also. Thus Mr. Hawes, in his work on the jurisdiction of courts says :—“ A judge who is a stockholder in a corporation is an interested party in a suit by the corporation. The smallest pecuniary interest disqualifies the person who is to act in the decision of the cause ; there can and ought to be no infringement or relaxation of the rule. Where a case is of such a nature as to make it necessary in its course or final issue, for the trier to pass upon his own implicated rights or interests, the rule attaches and unseats him. The only exception known to this broad and general rule exists where there may be a necessity that the person so interested should act in order to prevent a failure in the administration of

⁹⁵ XXII W. R. (r. 7).⁹⁶ I. L. R. II (N. 40).⁹⁷ XX W. R. (r. 76).

justice."⁹⁵ Similarly, Mr. Freeman says:—"It is a maxim of every country that no man should be judge in his own cause."⁹⁶ The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies, are in full accordance upon this point, and wherever tribunals of justice have existed, all men have agreed that a Judge shall never have the power to decide where he is himself a party. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide his own cause is always a tacit exception to the authority of his office. Such I conceive to be the law of this State."⁹⁷ These principles extend to all the cases in which the judge has an interest, though minute, or indirect, as where one of the parties is a corporation of which the judge is one of the stock-holders.⁹⁸ Thus an order of appointment of an administrator by a judge having a claim against the estate has been held to be void.⁹⁹

In *Webster v. County of Washington*,¹⁰⁰ it was held, however, that an ownership of certain lands contiguous to the line of a proposed county highway, which may affect or enhance the value of such lands, is not such an interest as legally precludes the owner from acting as a member of the Board of County Commissioners upon a petition signed by himself and others for establishing the road. It has even been said, sometimes, that the interest to serve as disqualification must be a pecuniary or proprietary interest—a relation by which, as debtor or creditor, or heir or legatee, or otherwise, the judge will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror.¹ And in *Foremen v. Town of Marianna*,² a judge of a County Court was held not to be disqualified to act upon an application to annex territory to a Municipal Corporation by reason of being a resident of the Corporation, and having voted for or against the annexation. In *Bowman's case*,³ a judge was held not to be disqualified to sit in the trial of a case instituted by persons composing a committee of a Corporation by reason of the fact that he was an honorary member of the Corporation. In some of the States it is expressly enacted, however, that a Judge shall not try a cause

⁹⁵ 77 Ind. 280.
⁹⁶ 1. Hatternutta

^{97a}

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1 R. R.

22 Am.
Tenn. 27

¹⁰⁰ 11 Ind. 125. *Northampton v. Smith*, 11
Met. 320.
¹ 81 Oregon, 20 Minn. 241.
² 4 Ark. 61.

in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties, and on the ground of such an enactment it was contended in *Sauls v. Freeman*,¹ that Judge Broom was disqualified. The contention was overruled however, and Rancy, J., said:—"The interest meant by the statute is property interest. . . . We do not think, if an issue of fact in the *mandamus* proceeding could have been sent to a Jury for trial, that one of the signers of the petition would have been rendered incompetent as a Juror on the ground of interest by the mere fact of being such signer." Where, however, a town in which a Justice resided was summoned before him as trustee, his interest as one of the inhabitants of the town was held to make his action in taking a recognizance void."

Even relationship with either of the parties to a suit is considered a sufficient interest for disqualification from acting as a Judge; and there are statutory provisions to that effect in most of the States of the Union. Even in the absence of such provisions, decisions by Judges related to the parties have been held void in a number of States." Where the record showed mere relationship, the California Supreme Court held the decision to be void." In *Horton v. Howard*,² the Judge was a nephew by marriage to the plaintiff, and a statute expressly provided that "no Judge can sit as such in any cause in which he was a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties;" and the Michigan Supreme Court held that the judgment of the Court was totally void. Champlin, C. J., in delivering the judgment of the Court, said: "This statute, mandatory in its terms, voices the universal sentiment of mankind excluding Judges from sitting in cases where they are parties or are interested. . . . No judge can sit in his own cause. Should he do so, a decree rendered by him in his own favor would be utterly void. If he cannot sit, his seat, in a judicial sense, is vacant, and his acts are without judicial sanction. The inhibition of the statute is the same where he is related to a party to a cause, and the result is the same. The authorities are numerous and nearly uniform, which hold that a judgment or decree rendered by a Judge, contrary to a statute like ours, is void, and may

¹ 2 Allen, 706.
² 7 Am. Rep. 413.
 c. Follows 2 Post. 477.

³ 41 Barb. 77.

attacked collaterally : *Foot v. Morgan*,⁹ *Oakley v. Aspinwall*,¹⁰ *Estate of White* ;¹¹ *Chambers v. Hodges* ;¹² *Fechheimer v. Washington* ;¹³ *Hall v. Thayer* ;¹⁴ *In re Ryers* ;¹⁵ *In re Dodge, etc., Mfg. Co.* ;¹⁶ *Peninsular Ry. Co. v. Howard* ;¹⁷ *Stockwell v. Township Board* ;¹⁸ *Shannon v. Smith* ;¹⁹ *West v. Wheeler*.²⁰ It is urged that the remedy of the defendants was by appeal, and to have raised and contested the question of the validity of the decree in the Appellate Court. But the decree in the Court below was taken upon the matter of the bill as confessed for want of an appearance. The defendants could not be presumed to know that a decree could be entered against them by a Judge disqualified on the ground of kinship or affinity. And as the record does not disclose the fact, it is not quite clear how the question could be raised upon the record upon appeal. But the objection reaches further than the mere rights of parties to the suit. It involves the administration of justice before unprejudiced and impartial tribunals, whose judicial acts the public are interested in placing above the plane of criticism or reproach. If a decree of an inferior Court may be sustained because an appeal will lie, what shall be done when a decree of a Court of last resort is passed and entered by Judges interested or related to the parties ? It cannot be corrected by appeal. The statute applies to all Judges and to all Courts, and renders their acts *coram non iudice*. In *Peninsular Ry. Co. v. Howard*,¹ it was said : - " It is not a matter of discretion with the Judge or other person acting in a judicial capacity, nor is it left to his own sense of propriety or decency, but the principle forbids him to act in such capacity at all when he is thus interested, or when he may possibly be subjected to the temptation. His powers are absolutely subject to this limitation." And in *Stockwell v. Township Board*,² it was said : - " The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance."

The New York Courts even hold a judgment void where the Judge is related to the real party in interest, although not to any party of record.³ In England, however, a judgment by

⁹ 1 Hill, 634.
¹⁰ 3 N. Y. 547.
¹¹ 37 Cal. 192.
¹² 23 Tex. 134.
¹³ 77 Ind. 397.
¹⁴ 7 Am. Rep. 613.
¹⁵ 79 Am. Rep. 80.

¹⁶ 43 Am. Rep. 379.
¹⁷ 20 Mich. 2.
¹⁸ 22 Mich. 349.
¹⁹ 73 Mich. 42.
²⁰ 40 Mich. 40.
¹ *Foot v. Morgan*, 1 Hill, 634.
² *Stockwell v. Fullin*, 11 Mun. 204.

a Judge having an interest is held to be not void, but only erroneous and voidable. Thus in *Phillips v. Eyre*,²² it was said:—"As a rule the judgment of an interested Judge is voidable, and liable to be set aside by prohibition, error, or appeal, as the case may be; but it is not absolutely void; and persons acting under the authority of such a judgment before it is set aside by competent authority would not be liable to be treated as trespassers." This has been approved in the recent case of *Fowler v. Brooks*,²³ by the New Hampshire Supreme Court. In *Dimes v. Grand Junction Canal Co.*,²⁴ a decree pronounced by an interested Judge was again held to be merely voidable and not void. In *Koger v. Franklin*,²⁵ the Alabama Supreme Court has held the same. It appears that generally where the disqualification is a result of common law, a judgment by a Judge so disqualified is held to be voidable only, but where the disqualification has been formally enacted, the judgment is held void.²⁶ This distinction has, however, been repudiated in a number of cases.²⁷ Mr. Vanfleet also maintains that, such decisions are always only voidable and never void, and condemning the distinction, says: "No reason has ever been assigned for this distinction. The mandate of the common law is just as imperative to the courts as the mandate of the statute. Why a different consequence should flow from a disregard of the one than from a disregard of the other, it is difficult to discover."²⁸ It is noticeable, however, that there is no statutory provision concerning the disqualification in Indiana, and still a decision by an interested Judge has been held to be void there.²⁹ The question has not received an authoritative expression of opinion in this country, but may be expected to receive a similar treatment when it arises for settlement.

162. On a similar principle, a Judge is not competent to try a suit, in which he acted as counsel prior to the trial. In England, Judges invariably decline to take any part in the decision of a case in which they were counsel when at the bar.³⁰ In Texas and some other of the United States, it is expressly

²² 1 L. R. G. Q. B. 22.

²³ 10 Am. St. Rep. 425.

²⁴ 3 H. L. Cas. 749.

²⁵ 79 Ala. 207.

²⁶ The contrary decision in *State v.*

23 Ala. 85.

²⁷ *10 C. Light 46 Am. Rep. 604.*

²⁸

1 C. Whomer v. Washington, 27 Ind. 366.

²⁹ *Frederick County v. Cheney, 10 N. W. R. 324.*

Koger v. Franklin, 79 Ala. 505.

Barman v. Henderson, 50 Ala. 619.

³⁰ *Law, Col. Att. 55.*

³¹ *Chicago Ry. Co. v. Summers, 3 Am*

615.

enacted that "no judge shall sit when he shall have been counsel in the case," and judgments by Judges in cases in which they have acted as counsel are usually held void. Thus in *Wigand v. Dejonge*,³¹ a decree of a surrogate in New York in a matter wherein he had been counsel, was held void. The Texas Supreme Court has in the recent case of *Abram v. State*³² held even a trial before such a Judge to be altogether void. The same court had held the judgment void even when given in another suit brought for different relief on the same cause of action by the opposite party.³³ The Indiana Supreme Court also took the same view in *Chicago and Atlantic Ry. Co. v. Summers*,³⁴ but in that case it appears that the Judge was "still acting as the attorney for the plaintiff, and not otherwise," at the time he rendered judgment.

Mr. Vanfleet maintains—"that in all such cases the Judge is a *de facto* officer and that his decisions are not void."^{35k} The courts also have sometimes held them not to be void. Thus in Iowa, there is a statutory provision similar to that in Texas, and *non obstante* the Judge's action was there held not to be void.³⁶ In Maine a statute required Justices to be disinterested, and in *Lovering v. Lamson*,³⁷ a discharge of a poor debtor by a Justice who had acted as his counsel in the matter was held to be not void. The decision by the Texas Court in *Chambers v. Hodges*, is not against that view, as there the Judge had not only been counsel but was to receive half the judgment as his fee. Even the Texas Court held in *King v.*

k. The same view is put forward with force in a recent issue of the *American Law Review*,³⁸ where after reference to the decision in *Abram v. State*,³⁷ it is said;—"That is not the law, and there is no sense in it. All judicial authority is to the effect that a judgment rendered by a *de facto* Judge is a good judgment. He may be a mere usurper, and never have been elected to the office, but so long as he is in possession of the office under color of authority with the consent of the State, his judgments are valid, and they are valid on the plain ground that the greatest injury to innocent suitors, and even to persons not suitors, would be brought by declaring them void. On precisely the same grounds, a judgment rendered by a Judge who may be disqualified to sit in the particular case, is a judgment of a Judge *de facto*, and ought to be upheld in every collateral proceeding. How shall third persons know whether he had been the counsel in the case, or related within prohibited degrees to one of the parties, or interested in the outcome of the suit, or otherwise subject to some constitutional or statutory disqualification? But if he does preside, and if his qualification to preside is not challenged, and his judgment is not overthrown by reason of his disqualification in a direct proceeding for that purpose, either on appeal or writ of error, or in a direct proceeding to set it aside and annul it and enjoin the successful party from executing it—then on the most obvious principles, it ought to stand; and it is a wild dream to say that it is mere nullity, and exactly the same as though there had been no Judge and no trial."

³¹ Abb. New. Co.

³⁴ Am.

³³ Am.
Cnl. Att.

³⁶ 37 Am. L. Rev.

³⁷ 20 S. W. R. 997.

³⁸ Floyd

³⁹ 50

, 10 N. W. R.

Sapp,⁴⁰ that "where the Judge had been counsel for other plaintiffs in another cause against defendant arising out of the same transaction, he was not disqualified on that ground."

163. This principle does not extend to disqualify a Judge from trying a suit to which the Government that appointed him "Judge, and supervises his work as such, is a party." This was laid down and explained in *Bikrama Singh v. Bir Singh*,⁴¹ by Plowden, J., who, in an elaborate judgment, said,⁴²—"In many States the courts are constituted, and the Judges appointed by the ruling power, and wherever this is the practice, there must be a possibility that in a contest in Court between the ruling power and a private individual, the Judge will have a leaning towards the case presented for the ruling power. This possibility is perhaps greater when the opponent of the ruling power is an alien. In many of the Foundatory States in India, the State is virtually the Ruling Chief, by whatever title he is designated, and frequently the Ruling Chief not only constitutes the courts of the State and appoints the Judges, but personally exercises judicial functions as a court of last resort, and also as a court of general control. Further, the Ruling Chief sometimes acts as a representative of the State in some of its external relations, and exercises, personally, functions which, in more complete communities, are not discharged by the Sovereign in person. It appears that in the State of Faridkot the custom is that process issued for service in foreign territory is issued under the hand of the Raja himself. What occurred in the present instance seems to be this: The Raja of Faridkot had two claims to make against a former servant of the State, claims which were undoubtedly cognizable in some form outside the State, but which, as he was advised, and as we have held, rightly advised, were also legally cognizable by the civil courts of his own territory. There was one court in the State of civil jurisdiction unlimited in respect of the value or amount of the suits instituted, and this was presided over by an officer styled 'Deputy Ganga Parshad.' He was absent at the time when the suits of the Raja against Bir Singh were ready to be filed. The Raja, therefore, adopted a course which he was advised was legal, that is, he, by special commission, empowered Gauhar Singh, another judicial officer,

to try these suits. The commission reserved power to Deputy Ganga Pershad to deal with the suits, in the event of his return to the State; but also gave full power to Gauhar Singh. . . . Nor do I think it can be said that there is any indication of bad faith in the selection of Gauhar Singh as the officer to preside in the Special Court. He was an old judicial officer of the State, and apparently the natural person to select, as one of the next, if not the next in judicial rank to the absent Deputy. It does not appear, that the Raja took part in the decisions of the suits or interfered with their trial by Gauhar Singh. The part he took in respect of the issue of process was purely formal. Nor has there been any exercise of appellate jurisdiction by the Raja. If there had been, the circumstance would no doubt be most material. Next in regard to Gauhar Singh, I do not think it can rightly be held, that he was disqualified by interest from trying these suits. He had no direct interest in the subject-matter. We are virtually asked, in the absence of any particular disqualifying interest, to affirm the proposition that no servant of a State can be qualified to act judicially in a matter in which the State is a party. That is a length to which I am certainly not prepared to go in the absence of all authority, and in the view of the judicial system and practice of this and other civilised countries. The parallel between the State of Faridkot and these other States is of course not perfect, but the difference is not such as to warrant us in holding that no Judge of a Native State in India can be regarded as competent to try a suit to which the Ruler of the State is a party." Similarly Frizelle, J., in delivering judgment in *Jones v. Zahru Mal*,¹ said:-- "In the present case the plaintiff is not the Raja, but a servant of the State, and although the Raja may be personally interested in the case, so was the Faridkot Raja in the other case, and this fact does not invalidate a judgment pronounced by one of his tribunals, however much that tribunal may be subservient to him, or make the judgment one opposed to natural justice so as not to form a good cause of action in a British Court. It is not a good plea that the Raja himself was the virtual plaintiff, or that the Court did as he told it, in the absence of proof that he did any thing to influence its decision, or that the judgment was for any other reason contrary to natural justice."

CHAPTER VII.

EXISTENCE OF JURISDICTION.

164. A decision to be *res judicata* must have been passed by a court having jurisdiction not only over the suit in which it was passed but also over the subsequent suit in which it is pleaded as a *res judicata*. The competency of the jurisdiction required over the subsequent suit has however to be determined with reference to the facts at the time of the institution of the former suit. This was held by the Calcutta High Court in *Gopi Nath v. Bhugwat Pershad*,¹ in which Mitter and Norris, J.J., said: "If the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such court would be conclusive under Sec. 13, although on a subsequent date, by a rise in the value of such property (the property in suit) or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property." This decision was followed in *Rughunath v. Issur Chunder*,² in which Sir Richard Garth, C. J., in delivering the judgment of a Division Bench, after expressing concurrence with the principles of that decision, said:—"There is no doubt that the Court in which this suit is brought, and that in which the former suit was brought, are Courts of different jurisdictions; but at the same time the Court in which the former suit was brought was the only Court at that time competent to try suits of that kind, and if this very suit had been brought at that time, the Deputy Collector's Court would have been the only Court competent to try it." The same was held in *Kunji Amma v. Raman Menon*,³ where a change of law affecting the jurisdiction was effected while the former suit was pending, and Sir Arthur Collins, C. J., and Wilkinson, J., said that "the words 'competent to try such subsequent suit,' must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined."

165. A very strict view has sometimes been taken of the competency of jurisdiction required over the two suits for the purposes of *res judicata*. Thus the Bombay High Court held in *Bholabhai v. Adesang*,¹ that the words, 'competent to try such subsequent suit' in Sec. 13, meant competent to try the suit or issue on account of its nature' with conclusive effect, since otherwise the higher jurisdiction provided by the Code would be excluded by the lower. Mr. Justice West, in delivering the judgment of the Court, said : "The question is, whether the tenancy held by the plaintiff is or is not subject to enhancement of the rent paid by him. . . . The earlier decision was in a cause of less than Rs. 500 in amount, and for this reason a special or second appeal made by the plaintiff was dismissed as not cognizable by this Court. The present suit is for more than Rs. 500, and it is urged that the former decision on the right to enhance having been given by a Court competent to try the present suit (by the same Court, in fact, that has tried the present suit.) and on a point directly and substantially in issue, binds the parties and the Court and every Court as to the legal relation thus established in all future cases between the same litigants. The District Court was, no doubt, competent to deal with the 'subsequent suit,' in this instance, but it could not give a final unappealable decision in the suit. The District Court could not, therefore, try the second suit with the same jurisdiction as the first—*Chunder Coomar Mundul v. Namni Khanum*." But, from the point of view suggested for the respondent, the decision in the first suit of a particular point would, in the second suit, be binding on the parties in this Court, though had it been decided in the second suit itself it would not be binding. Consequently, the determination of the point in the suit of smaller value would, on account of its very smallness, acquire a conclusive importance that it would not have had if the amount had been larger. In the latter case the High Court must have entertained the second appeal against the earlier decision. The insignificance of the amount prevented this; and now it is said that the decision, which was statutorily beneath the cognizance of the High Court, binds the High Court in a more important case. Such a result is manifestly opposed to reason, and cannot, we think, have been intended by the Legislature. But, if the prior judgment in a case too petty for appeal is not to bind the

¹ 1 L. B. 12 Bom. 75² XIX W. R. 321

High Court, neither can it bind the Subordinate Courts whose judgments are subject to appeal to the High Court. And this must be so equally in a case which on account of its small valuation is not subject to appeal as in one subject to appeal to the High Court, since it is impossible that the prior decision should or should not be *res judicata* for the lower courts merely according to the admissibility, or not, of a further appeal to the High Court. If it were so, we should sometimes have contradictory decisions, each *res judicata* on the same point of jural contention. In the continental countries of Europe in which, as in India, an appeal is generally admitted as a part of the regular civil procedure—the rule is that no matter decided by a lower court, in which an appeal is excluded, can be *res judicata* for any other case, either in the same or in any other court.* That which has been decided incidentally, but for its purpose finally, is regarded merely as an exceptional element of the judgment in such a case, not as the establishment of a principle which may extend to other cases and other courts. The decision, in fact, is construed, in relation to future cases, as an exceptional law or section is construed,—that is, as not admitting of any extension by inference on account of its admittedly special and singular character. A complete recognition of the same principle in the Indian Courts would afford a ready solution of many difficulties; but, though it has been glanced at on many occasions,† it has never thus far been precisely formulated either by the Legislature or by the courts. In the case before us the former decision could not be appealed against to the High Court, and thus, though the court, which gave that decision, was in one sense competent to try the subsequent suit, and did try it, yet it was not competent to try the subsequent suit with final effect as it had tried the earlier one. Though the court was the same physically, yet it had not on the two occasions an identical jurisdiction. Moreover, for the purpose of establishing a prior decision as *res judicata*, we must look to the whole series of possible proceedings up to the highest available ordinary tribunal; otherwise, as we have seen, the anomaly must arise of the highest Court in an important case being bound by a prior decision in the lowest Court in a case too paltry for an appeal.” The same appears to have been held in *Babji Pandurang v. Dhondo Vithal*;‡ and follow-

* Sav. Sys. Sec. 207

† *Janak v. Hira*, 1971, Bom. P. J. 170
Educa v. Hon VIII W. R. 175.

Raghobardas v. Bhoob Bakhshi, L.R. 9 I.A. 197
 * 1956 Bom. P. J. 32.

ing both these decisions, Sir Charles Sargent, C.J., and Telang, J., held in *Govind v. Dhondbarar*⁹ that the decisions in the previous suits, which were in the nature of small cause suits, in which there was no right of second appeal, could not operate as *res judicata* in the present suit.

In the Madras High Court, Mr. Justice Subramanya Iyyar has gone even further in the same direction. After referring to the above cases in *Vithilinga Padayachi v. Vithilinga Mudali*,¹⁰ he said :—“ They seem to me necessarily to involve the proposition, that in appealable cases, a decision to be *res judicata* must have been given in a previous suit which the parties, according to the ordinary procedure, were entitled to take, as to fact and law, ultimately to the same (or corresponding) appellate tribunal to which the subsequent litigation, wherein the decision is relied on as conclusive, could be carried. If the rule thus deduced is correct, the first defendant's contention as to *res judicata* is unsustainable, as the suit in the Subordinate Court was for less than Rs. 5,000 and only an appeal upon questions of law lay to the High Court ; whereas the present claim is for a sum over Rs. 5,000, and admits of appeal on the facts also. . . . Concurrence of jurisdiction must exist not only as to the original Court, but also as to the appellate tribunals and their powers in the respective suits. That the necessity for this complete concurrence of jurisdiction in appeal also was distinctly present to the Privy Council is clear from the observation of their Lordships. “ It is true that there is an appeal from the Munsif's decision, but that upon the facts would lie to the District Court, and not to the High Court.”¹¹ It may be observed, however, that the question before the Privy Council was quite different, and a contrary view appears to have been assumed as correct by Kernan and Wilkinson, J.J., in *Singarachariar v.*

In the Punjab Chief Court, Rattigan and Roe, J.J., in *Mahsum Ali v. Nijabathkhan*,¹² strongly dissented from the decision in L. L. R. IX Bom. 75, on the ground that “ the Courts have no power to thus import the doctrine of convenience into the interpretation of Acts of the Legislature, . . . and if it were allowable . . . we should be inclined to hold that the Bombay interpretation of Sec. 13 is by far the most inconvenient of the two ; ” but that decision has been overruled by a Full Bench of the Court in *Shamsdin v.*

⁹ L. XV Mad. 111.

¹⁰ *Raghobardas v. Suresh Chandra Sengupta*, L. R.

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Ghulam Qadir,¹⁵ in which Riwaz, J., in delivering the judgment of the Court said :—"The Munsif who tried the first suit would have had jurisdiction to entertain the present suit. At the same time, he would not have tried the second suit with the same jurisdiction as the first suit, inasmuch as the first was a small cause, and one appeal therefore lay to the District Judge, whose decision was final, whereas the present suits are land suits appealable in the first instance to the Divisional Judge, with a possible further appeal to this Court. Under the above circumstance, we think that we should hold, both upon principle and upon authority, that the Court deciding the first suit was not a Court of jurisdiction competent to try the subsequent suits."

In America it has been recently held by the New York Court of Appeals¹⁶ that the fact that the amount in dispute is so small that the defeated party has no right of appeal does not make the judgment any the less conclusive, when the same question arises in a subsequent suit for an amount large enough to allow an appeal.

166. On the other hand, it has sometimes been held that the concurrence of jurisdiction required by Sec. 13 extends only to what has been designated essential jurisdiction, has reference merely to the nature and the value of the subject-matter of the suit. Thus Sir Arthur Collins, C. J., and Wilkinson, J., in *Kunji Amma v. Raman Menon*¹⁷ observed that the Court of a Subordinate Judge having jurisdiction to try a suit is not incompetent to try it, within the meaning of Sec. 13, simply by reason of an independent Raja being made a party, against whom it would of course be heard by a District Judge only, and speaking of a court competent to try the suit within the meaning of Sec. 13, they said: "Those words have been interpreted by their Lordships of the Privy Council to mean a court concurrent jurisdiction with the Court trying the suit, whether as regards the subject-matter of the suit or the pecuniary limits of its jurisdiction." This observation was an *obiter dictum*, as the decision proceeded on another ground, and may be supported as against the Raja on the principle that a want of jurisdiction arising from personal privilege may be waived, and in regard to the defendants in the former suit on the general principle of *res judicata* explained in Sec. 80,

coupled with the doctrine of the partibility of judgments, to which reference will be made in sequel. The statement as to the view of their Lordships of the Privy Council is also not borne out by the decision in *Raghobardial v. Sheo Baksh Singh*¹⁶ which is cited as an authority for it. Its correctness appears, however, to follow directly the recognition of foreign judgments as *res judicata*. Thus in *Vanquelin v. Bonard*,¹⁷ a plea against a foreign judgment that the defendant was not a trader and did not reside within a certain district, so as to give the French court, that pronounced the judgment, jurisdiction over him, was held to be bad, on the ground that it was consistent with the court having jurisdiction over his person and the subject matter of the cause, which was sufficient. This decision was cited with approval in *Bikrama Singh v. Bir Singh*,¹⁸ in which the same view was taken of the competency of jurisdiction over the subsequent suit, and Sir M. Plowden said:—“According to *Godard v. Gray*,¹⁹ it is open to the defendant to show that the court in pronouncing the judgment exceeded its jurisdiction according to the laws of its own country. This can scarcely mean that every objection to the jurisdiction according to such laws, which might have been made at the trial, may be taken in the subsequent suit. It would be difficult to reconcile the proposition thus construed with other decisions of the English courts. It probably means that the defendant may show that the court exceeded its jurisdiction according to its own laws, inasmuch as by such laws it had not jurisdiction over the person of the defendant or the subject-matter of the suit.”

In *Babubhat v. Narharbhat*,²⁰ it appears to have been urged against the plea of *res judicata* by a foreign judgment, that the foreign court that passed the judgment could not have jurisdiction over the subsequent suit in which the plea was raised. Mr. Justice Birdwood, in delivering the judgment of a Division Bench of the Bombay High Court, said:—“Mr. Field seems to be of opinion that, when the Code was amended in 1882, this principle was lost sight of—a Foreign court not being within the words ‘a court of jurisdiction competent to try such subsequent suit.’ If the interpretation contended for were correct, the decision of no District court would ordinarily be *res judicata* in another district, inasmuch as the jurisdiction of each District court is ordinarily limited to cases

¹⁶ 1 L. R. IV. 480.
¹⁷ 3 L. J. C. 168.
 P. R. No. 12.

¹⁸ 1 L. R.
¹⁹ 1 L. R. 211.

arising in the district itself. Such an interpretation would restrict the application of the section in a way which could not have been intended, and would deprive Explanation VI of all meaning. . . . We cannot so construe the section as to neutralize the provision contained in Explanation VI., and to restrict to an inconvenient extent the application of the rule laid down in *the Duchess of Kingston's case*. . . . We think that the intention of the Legislature was merely to give more definite expression to that rule, and that the words mean 'court having concurrent jurisdiction with the court trying the subsequent suit, whether as regards the pecuniary limit of its jurisdiction or the subject-matter of the suit, to try it with conclusive effect.' "

167. Competency of jurisdiction has been deemed essential to the application of the doctrine of *res judicata*, as it is generally agreed upon that a judgment rendered by a court not having jurisdiction is void and a mere nullity ; and the rule applies equally whether the judgment is of a court of general or special, of foreign or domestic jurisdiction, and whether the judgment is questioned directly or collaterally.¹ Nor is it important for the *prima facie* invalidity of the judgment whether it is the essential jurisdiction or the local or personal that is wanting. Mr. Herman, speaking of the practice of the American Courts, says :—"When a Court transcends the limits prescribed for it by law, and assumes to act where it has no jurisdiction, its adjudications will be utterly void and of no effect either as an estoppel or otherwise. A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question."²

In *Wall v. Wall*,³ Williams, J., delivering the judgment of the Pennsylvania Supreme Court said :—"If the Court has no jurisdiction, it is of no consequence that the proceedings have been formally conducted, for they are *coram non judice*. A judgment rendered by a Justice of the Peace in a cause over which he has no jurisdiction is void, notwithstanding service may have been regularly made on the defendant, and he may

¹ *v. v. Burks*, 24 Am. Dec. 151.
² *Barb. v. O'Brien*, 11 Gr. 421.

³ *Bowman v. Cunney*, 21
Linn. Cases, 32 Gr.
 in *Common* 119.
 12, 61 Rep. 112.

have failed to appeal or take a *certiorari* within the time prescribed by law. A judgment rendered in the Court of Quarter Sessions, in a proceeding exclusively within the jurisdiction of the Common Pleas, and *vice versa*, is void for want of jurisdiction in the Court rendering the judgment. So although the Court may have jurisdiction of the subject-matter, yet if there be no service, actual or constructive, on the defendant, the judgment is void for want of jurisdiction over the person to be affected. If such want of jurisdiction appear upon the record, it can be taken advantage of at any time and in any Court where the conclusiveness of the judgment is the subject of judicial inquiry. The reason for this is found in the fact that the record of the judgment bears on its face the proof of its illegality, and shows the want of power in the tribunal to render it." In *Frankel v. Satterfield*,²¹ the Delaware Supreme Court said: "Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent from the record, it is, in legal effect, no judgment." In legal contemplation it has never had lawful existence. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void.²² It cannot be the basis of an execution or the foundation of a valid title to property purchased at a sale thereunder.²³ It is unavailing for any purpose. It can be taken advantage of at any time, and in any court where it is offered as a conclusive adjudication between the parties; for an inspection shows that it is not such, because the court had no power, for manifest want of jurisdiction, to make an adjudication. Such a judgment, when collaterally drawn in question, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal. This doctrine has been recognized repeatedly in actions of trespass, ejectment, debt on judgments, and other collateral proceedings, wherein such judgments have been drawn in question." In *Elliott v. Pearsol*,²⁴ Trimble, J., said that if a court should "act without authority its judgment

and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers." In *Holmes v. Eason*,⁵⁰ the Tennessee Supreme Court said: "A void judgment is, in legal effect, no judgment. It neither binds nor bars any one. All acts performed under it, and all claims derived from it, are void. Parties attempting to enforce it are trespassers. . . . No action is required to revoke it; it is null in itself. The nullity ought, therefore, to appear on its face." In *Hans Nielsen*,⁵¹ Bradley, J., said: "It is firmly established that, if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken, are unconstitutional, . . . the judgment is void, and may be questioned collaterally. Mr. Vanfleet contends "that any doctrine which holds that a decision of a competent judicial tribunal, and especially that of the highest in the land, on a doubtful point of law, is void collaterally, and that all rights or titles founded thereon are void, whenever the court of last resort changes its rulings for any cause, is not correct on principle;" and "that a right or title founded upon the judgment of any judicial tribunal based on a doubtful or debatable question of law, is not void; that to hold such a right or title void to the damage of innocent holders, is against sound public policy; that it tends to bring the courts into merited disrespect."⁵² He suggests as the correct principle, that "when the tribunal has power to grant the relief sought in a specified class of cases, the granting of that relief in a prohibited case, which is similar to the specified cases, or belongs to the same general class, is not void. . . . If the court has power to render a judgment for money on causes sounding in contract only, its judgment for money is not void because the cause sounded in tort. That is a matter of defense to be brought to the attention of the court. The same principle applies where the law prohibits certain persons from suing or being sued in that court. As the court has power to grant the relief sought in all proper cases, the granting of the same to or against an improper person, is merely a wrongful exercise of power and not usurpation."⁵³

168. Even when a Court has not jurisdiction over the subject-matter of a suit, it may determine its want of jurisdiction, and as incidental to that, may render a judgment for costs.⁵⁴ The Indian Civil Procedure Code after providing that the Court shall have power to give and apportion costs of every application and suit, expressly adds that "the fact that the Court has no jurisdiction to try the case is no bar to the exercise of such power." Notwithstanding that the Court has not jurisdiction over the suit, the judgment for costs will not be void. In fact it is a general principle, that a judgment in a suit may always be valid to the extent of the Court's jurisdiction in the suit. Thus a judgment in a suit embracing several causes of action, some of which are not within the jurisdiction of the Court, will not be void as to the causes that are within the Court's jurisdiction.⁵⁵ Mr. Freeman thus observes that "lands and other property situate in another State or country are not within the jurisdiction of the Courts of this State, and cannot be directly affected by their judgments;"⁵⁶ and says: "If, however, the Court has jurisdiction of the action and the parties, and is competent to give part of the relief granted, its judgment, so far as within its powers, is valid."⁵⁷

The High Courts of Calcutta and Allahabad have also held that in such cases a decree for money, affecting immovable property situate outside the local limits of the jurisdiction of the Court passing it, will not be altogether void, but be deemed as a money decree merely.⁵⁸ On the same principle, the California Supreme Court has held that an alternative prayer in a petition to sell land of a decedent, which the Court has no power to grant, does not make the order to sell void.⁵⁹ In the United States it has sometimes even been held that if a Court gives decree for an amount exceeding the maximum limit of its jurisdiction, the decree is valid up to the amount of that limit, and void only for the excess, though it may be observed that the weight of authority is clearly against such a view.⁶⁰

⁵⁴ *Moshingant v. Mosari*, 1 L. R. VII Cal. 371.

King v. Pugh, 36 Barb. 343.

Blair v. Cummings, 30 Cal. 607.

v. Jackson, 22 Ohio. 306.

v. Hetcher, 13 R. R. R. 314.

⁵⁵ *Johnson v. Iron Belt Min. Co.*, 47 N. W. R. 367.

⁵⁶ *Wimer v. Wimer*, 3 Am. St. Rep. 120.

O'Reilly, 1 Am. St. Rep.

⁵⁷ *Id.*

⁵⁸ *Balakrishna Lal v. Portam Singh*, 1 L. R. V Cal. 928.

Gudr. Lal v. Jagannath, 1 L. R. VIII All. 117.

⁵⁹ *Stuart v. Allen*, 76 Am.

⁶⁰ *Law. Col. Att.* 52.

169. On the same principle, the want of jurisdiction over

defendants does not
avoid the judgment
against the other de-
fendants within
diction.

one or some of the defendants in a suit
will not render the judgment in that suit
void altogether, void as even against
the other defendants over whom the
Court has had jurisdiction. Judgments
are often permitted on motion in the
exercise of a *quasi* equitable jurisdiction,

to be set aside as to one defendant, and to stand as to others, to be treated as void in regard to one defendant and valid as to the others.⁴¹ It has even been held that a judgment if passed against a person not a party to a suit, and against another who is a party, is valid against the latter.⁴² The same appears to have been held in *Cruikshank v. Gardner*;⁴³ *Sheldon v. Quinlon*;⁴⁴ *Williams v. Chalfant*;⁴⁵ *Jansen v. Varnum*;⁴⁶ *Earp v. Lee*;⁴⁷ and *Goit v. Joyce*.⁴⁸ In *Tedlie v. Dill*,⁴⁹ one of the defendants was dead at the time of the rendition of the judgment, and the Georgia Supreme Court said: "A judgment, as being an entire thing, cannot be reversed in part and stand good as to the other part, or be reversed as to one party and remain good against the rest." The Illinois Supreme Court has held the same in other cases also,⁵⁰ and in the case last cited, the facts of which were similar to those of the above case, said that "the judgment is a unit as to all the defendants, and if erroneous as to one, it is erroneous as to all." The contrary was held in *Hull v. Williams*,⁵¹ in which case a suit having been brought in Massachusetts on a judgment recovered in Georgia against two defendants, it appeared from the record that one of the defendants had not been summoned, and had not appeared in the suit in which that judgment was passed. Parker, C. J., in delivering the opinion of the Court, said "If it was a nullity with respect to one it was a nullity also as to the other defendant." This decision was followed in *Wright v. Andrews*,⁵² in which Gray, C. J., said that if the "Court had no jurisdiction of one defendant, its judgment, being entire and unqualified, is, in the absence of any evidence of the law of Maine upon the subject, void against both."

Mr. Herman, after observing that "the weight of authority

⁴¹ Webster, 11 N.
12 Am. R.
47 Am.
Ark 374

⁴² 2 Hall
⁴³ 5 Hall, 441
⁴⁴ 62 Ill.
⁴⁵ 60 Ill.

⁴⁶ 2, 71
Am. Dec. 3
Am.

is in accord with the law, as laid down in *Hall v.* admits that: "Looking at the question from an equitable standpoint purely, there is some force in the appellant's contention that a judgment may and ought to be held valid as to parties summoned, and who had an opportunity to make their defence, even though it may be void as to others against whom no process was issued." He adds, however, that "if it be well settled, and such seems to be the law, that a judgment which is void as to one of the defendants is void also as to the other, the plaintiff in taking such a judgment has no one to blame but himself." This view is, however, not sustained by later authorities. Mr. Freeman observes that "generally the courts following the *dictum* (in *Hall v. Williams*) have contented themselves with citing it as their authority, but so many of them have followed it, that it was at one time very doubtful whether it was not sustained by the majority of the adjudications upon the subject;" but adds, "this doubt no longer exists, and that the decided preponderance of authorities maintain that a judgment against two or more is not void as against those of whom the Court had jurisdiction, though void as against others."⁵⁵ Mr. Vantleet, after pointing out that a joint judgment for damages against several, some of whom have not been served, is not held to be void in respect to those served, in Arkansas,⁵⁶ Missouri,⁵⁷ New Jersey,⁵⁸ Ohio,⁵⁹ Oregon,⁶⁰ Tennessee,⁶¹ Texas,⁶² and Virginia,⁶³ and by the Supreme Court of the United States,⁶⁴ though held to be such in some of the other States,⁶⁵ says: "There is jurisdiction over the subject-matter in such cases, and the defendant served is before the Court, and if it is error to render a judgment against him without first dismissing or continuing as to the defendant not served, that is a mere mistake of practice; and if the name of his co-defendant is included in the judgment, the record shows that it is nothing, and how that can vitiate anything else it is difficult to determine. In Minnesota, where a part only of the joint makers

⁵⁵ *St. John v. Holmes*, 32 Am. De.
Winchester v. Boat
Norton v. Mudge, 81 Dec. 411
Newburg v. Munch, 23 Am. Rep.
Merrett v. James, 6 486
v. McTear, 57 Mo.
v. To

Crank v. Flowers, 41
Kitchens v. Hollings, 64 Mo.
Gray v. Stuart, 33 Gratt. 3
⁵⁶ Fr. Jud. 255
⁵⁷ *Chick v. Peck*, 10 Ark. 574

⁵⁸ *Lenox v. Clark*, 52 Mo. 115.
Horton v. Townes, 51 Mo. 360.
Asbury v. Odell, 51 Mo. 204.
⁵⁹ *Scuyler v. Menden*, 16 N. J. L.
⁶⁰ *Douglas v. Mason*, 47 Am.
v. 48 Am. Dec.
or v. Bearden, 51 Am. Dec. 702.
⁶¹ *Holmes v. Dashiell*, 32 Tex. 157.
⁶² *Gray v. Stuart*, 33 Gratt. 351.
⁶³ *Wentley v. Donoghue*, 116 U. S. 1.
Ross v. Abbott, 116 U. S. 377.

of a note were served, the Statute required the judgment to be rendered against all, to be made from the separate property of those served, and the joint property of all; but in such a case, a judgment against those served only, is not void.⁶⁵ So it was decided in California that a judgment of another State against the separate property of those served and the joint property of all, was not void.^{66, 67}

The same view has been taken by the Missouri Supreme Court in the recent case of *State v. Tate*,^{67a} in which the plaintiff obtained a judgment on a joint and several contract against all promisors, one of whom had died before service of process; and the judgment was on an application for review held to be merely irregular, and not void against the other defendants. Barclay, J., in delivering the judgment of the court, after observing that it did not affect their substantial rights upon the merits, said: "The only basis for contending that it did rest on the supposed entirety of every judgment at law. There are numerous remarks scattered through our reported cases to the effect that such a judgment is an entirety, and must stand or fall compactly as to all parties defendant to it; and some decisions rest squarely upon that proposition: *Smith's Adm'r v. Rollins*; ^{67b} *Hoskinson v. Adkins*; ^{67c} *Covenant, etc. Ins. Co v. Clorer*; ^{67d} *Pomeroy v. Betts*; ^{67e} but there are also many final rulings inconsistent with that theory so broadly stated. It has been frequently held that in a collateral proceeding the fact that such a judgment is void as to one defendant does not, of itself, necessarily vitiate it as to others: *Lenox v. Clarke*; ^{67f} *Wernecke v. Wood*; ^{67g} *Holton v. Towner*; ^{67h} *Williams v. Hudson*; ⁶⁷ⁱ and in many cases where judgments at law have been questioned on appeal or error, the results announced are not in harmony with the theory of entirety. Thus in *Crispen v. Hannoran*,^{67j} though it is stated in a general way that a judgment is an entirety, the conclusion reached by this court striking out the name of a party erroneously joined as defendant in the circuit court's judgment, and then affirming the latter, shows a practical abandonment of the theory. The same action had been taken by this court previously in *Cruchon v. Brown*^{67k}; and *Weil v. Simmons*,^{67l} both cases at law. In the very recent case of

65 *Dillon v. Porter*, 31 N. W. R. 56.
66 *Brewster v. Spaulding*, 13 Pac. 661.
67 *Law. Coll. Atl.* 800.

67b 26 Mo. 406.
67c 77 Mo. 537.
67d 36 Mo. 392.
67e 31 Mo. 419.

67f 52 Mo. 111.
67g 58 Mo. 312.
67h 61 Mo. 389.
67i 51 Mo. 524.

67k 37 Mo. 38.
67l 66 Mo. 617.

Kleiber v. People's R'y Co.,^{67m} an action for damages for personal injuries, wherein there was a judgment against both defendants on the circuit, this court *in banc*, on appeal, affirmed the judgment as to one defendant, and reversed it as to the other. A similar practice has been followed in other instances: *Westcott v. Bridwell*; ⁶⁷ⁿ *Hunt v. Missouri R. R. Co.*; ^{67o} *La Riviere v. La Riviere*,^{67p} *Rude v. Mitchell*.^{67q} We apprehend that the more recent rulings on this point give better expression to the principles that animate our Code of procedure. We believe the latter intended to assimilate the treatment of judgments at law (when practicable), in the particular under consideration, to that which has always been conceded to apply to decrees in equity upon appeal: *Dickerson v. Chrisman*.^{67r} There may possibly be judgments which, owing to the peculiar nature of the proceedings wherein they occur, require to be treated as entireties. We are not now called upon to decide as to that, and it is better to avoid generalizing unnecessarily. Keeping in view the case before us, we hold that the liability of defendants in a judgment for the payment of money, originating in a joint and several contract, is several in nature, and that an irregularity in its rendition, as against one defendant, furnishes no sufficient reason to vacate the judgment, regularly rendered as to the other parties defendant therein."

In England the writ of summons may now be allowed to be served on any person outside the jurisdiction, when he is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction; and, notwithstanding the expression of a contrary opinion sometimes,⁶⁸ it has recently been held that this may be allowed in actions of tort also.⁶⁹ Mr. Pigott points out that this is a great advance on the previous rules, and that its effect on English subjects may possibly have to be considered at some future date, should it be copied into any of the foreign Codes.⁷⁰

Frizelle, J., in delivering judgment in *Jones v. Zahru Mal*,⁷¹ said that "the Divisional Judge has found that it (the Court) had no jurisdiction, merely because the defendants were not residing at Nahan when the suit commenced, held no property there, were not subjects of the State, and never

^{67m} 107 N. 340.
⁶⁷ⁿ 40 N. 146.

⁶⁸ *Lenders v. Anderson*, 13 Q. B. D. 80.
⁶⁹ *Field v. Bennett*, 1 Times L. R. 376.
⁷⁰ *Croft v. King*, (1903) 1 Q. B.
⁷¹ *Pig. For Jud.* 152.
⁷² 1903 P. R. No. 66, p. 212.

recognised the authority of the Court which tried the case. to residence, it is alleged in the appeal that at least one of the defendants has a permanent residence at Nahan. This probably means defendant No. 3, who is only nominally a party, and against whom it is doubtful whether a suit lay in British territory. His residing at Nahan would not give jurisdiction against defendants Nos. 1 and 2, who never acquiesced in the institution of the suit, and as to whom no formal permission was ever given by the Nahan Court to sue them at Nahan."

170. A Court is deemed to have jurisdiction over a suit only if it has jurisdiction over it throughout, at the time of its institution as well as at that of its disposal.⁷² It appears to be generally agreed upon that for the validity of a judgment in a suit, jurisdiction must so exist over it in regard to its subject-matter. Mr. Hawes⁷³ observes that "if an action is commenced in a Court without jurisdiction over the subject-matter, the proceeding is void; nor will the fact that subsequently jurisdiction was by law conferred upon the Court over that class of cases cure the error."⁷⁴ If the demand is beyond the jurisdiction of the Court but reduced by amendment to the limit of the Court's jurisdiction before the hearing of the evidence, a judgment for that amount will not be void. So also, if the plaint is amended, the fresh subject-matter may be beyond the jurisdiction of the Court. In *Chandu v. Kombi*,⁷⁵ the suit was for possession, and the defendant pleaded certain mortgages, and as the mortgages went on being proved, the plaintiff went on offering to redeem them. The High Court observed that "in this way, the amount of the subject-matter might become increased in value. If the amount in value of the subject-matter at the conclusion of the trial or before that appeared to be more than Rs. 2,500, then the Judge should not proceed further in the suit, but should give back the plaint to be filed in the proper Court. . . . I do not see any objection on principle to such increase arising on the construction of the Civil Courts' Act, or the Court Fees Act." The decision in *Shamray v. Niloji*,⁷⁶ is not against this view. It was held in that case that the Subordinate Judge's "jurisdiction would continue, whatever

Home Ins. Co. v. Morse, 20 Wall. 451.
Ransom v. Ballard, 133 Mass. 465.
Richardson v. Huster, 23 La. Ann. 365.
Fleischman v. Walker, 91 Ill. 318.
Dampe v. Dana, 29 Wis. 419.

⁷² *Haw. Jur.* 10.
⁷³ *Hart v. Watt*, 3 Allen. 522.
⁷⁴ *L. L. R.* 1X Mad. 212.
⁷⁵ *L. L. R.* X Bom. 202.

might be the result of the suit, in all such matters in the suit as, by the Code of Civil Procedure, are brought within his cognizance, amongst which are matters in execution in that suit, and the mere circumstance that the amount actually due under the decree by process of accumulation now exceeds Rs. 5,000, cannot oust him from the jurisdiction he has hitherto had over the suit." This was due, however, to the circumstance that jurisdiction in proceedings taken for the execution of a decree is by law not made to depend on the amount in respect of which the execution is taken, but on the amount claimed in the suit in which the decree was given.

171. This rule does not apply, however, to local jurisdiction, which need exist only at the institution of the suit. It is a general saying that the jurisdiction of a Court over a cause depends upon the state of facts at the time the action is brought. Mr. Hawes, after referring to it, says: "If jurisdiction once becomes vested, it cannot be divested by subsequent events, no change of residence or condition of parties being able to take away jurisdiction that has once attached."⁷⁷ So also Mr. Pigott says: "The state of things existing at the time of the institution of the suit is sufficient to determine the jurisdiction, for the progress of a suit once validly commenced in any court is not affected by change of residence or country by the defendant."⁷⁸ "If the defendants had been at the time, when the suit was commenced, resident in the country, so as to have the benefit of its laws, protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."⁷⁹

172. The same rule applies to personal jurisdiction also. Thus, if a suit is commenced while both the parties are alive, the Court has jurisdiction over it, and the death of either of them during its progress will not oust the jurisdiction, and a judgment rendered after that will be, until set aside, binding on the deceased's legal representative. In *Yaple v. Titus*,⁸⁰ the Pennsylvania Supreme Court said that "it would seem to be well established that in civil proceedings against a person his death does not so completely take away the jurisdiction of a

Jurisdiction not divested by death of either party after institution of the suit.

Court which has once attached as to render void a judgment subsequently given against him." The Indian Courts also have not treated a judgment against a person, deceased at the time of pronouncing it, as void for want of jurisdiction, and only denied it the effect of *res judicata* in subsequent proceedings between the plaintiff and the representatives of the deceased, on the ground that neither the deceased nor the representatives were parties to the suit in which that judgment was pronounced.¹¹ The contrary has been held in Mississippi, Missouri, Louisiana, Tennessee, Alabama, and some other States.¹² The decided weight of authority is, however, against that view; and the correct general rule is that while the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the suit in which the error occurs, and the judgment rendered after the party's death, though erroneous, is not void and open to a collateral assault.¹³

In *Life Association v. Fasset*¹⁴ the Supreme Court of Illinois made a distinction between the case of a plaintiff and of a defendant deceased, on the ground that in the former case the defendant might plead the fact of the plaintiff's death in abatement; but, "in the nature of things, the deceased defendant cannot plead in abatement or otherwise interpose the fact of his own death; and his legal representatives, until brought into court by the plaintiff, as contemplated by the Statute, are not supposed to be present, or to know anything about the pendency of the suit; and to hold a judgment obtained under such circumstances binding upon them would seem not only inconsistent with well-settled principles, but would probably lead to the perpetration of great frauds." This expression of opinion was mere *obiter dictum*, however, and the contrary has been held directly in *Claffin v. Dunne*,¹⁵ in which Craig, J., in delivering the judgment of that same Court, said: "There are authorities holding that a judgment rendered against a deceased person is void, but we think the weight of authority and the reason of the rule is that such a judgment is not void, but voidable." In *Mitchell v. Seaver*,¹⁶ the defendant in the former suit had died after en-

¹¹ *Hepin Behari v. Brojo Nath*, 1 L. R. VIII (Cal), 337.

¹² *Tarleton v. Cox*, 45 Miss. 431.

Young v. Pickens, 45 Miss. 553.

West v. Jordan, 62 Mo. 441.

1, 36 La. Ann. 337.

Collins v. Knight, 3 Tenn. Ch. 187.

Meyer v. Hearst, 70 Ala. 99.

¹³ *Stocking v. Hanson*, 22 Minn. 40.

¹⁴ 102 Ill. 31.

¹⁵ 16 Am. St. Rep. 261.

¹⁶ 8 Am. St. Rep. 282.

appearance, and the Supreme Court of Oregon held that that did not render the judgment passed against him void; Strahan, J., observing in the judgment, that "the decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void." In *Knott v. Taylor*,¹¹⁷ the decision against the voidness of the judgment in such a case was based on the ground that at the trial there was no suggestion that the defendant had died before that time, and the death was not known to the plaintiffs; Merriman, J., observing that "in the absence of such suggestion the presumption was that he was then living. The court had obtained jurisdiction of him in the action, and apparently it continued to have it, in all respects, at the time of the trial and the entry of the judgment. The latter was therefore not void." The Supreme Court of Nebraska has also held that a judgment pronounced after the death of a party is void if the fact and time of death appear on the record, but if that must be shown *aliundi*, it is only voidable and cannot be impeached collaterally.¹¹⁸ It has also recently been held by the Massachusetts Supreme Court that if a judgment is entered against a defendant after his death without knowledge thereof, it is *res judicata* in a subsequent suit by the plaintiff against the defendant's administrator.¹¹⁹ So also, Mr. Freeman says: "If an action is begun by and against living parties, over whom the Court obtains jurisdiction, and some of them subsequently die, it is not thereby deprived of its jurisdiction, and while it ought not to proceed to judgment without making the representatives or successors in interest of the deceased party parties to the action, yet if it does so proceed its action is irregular merely, and its judgment is not void."¹²⁰

A judgment has been held to be only voidable even when it was delivered after both the parties were dead.¹²¹ But, as observed by Mr. Freeman, it is necessary that there should, at some time during its progress, be living parties to both sides of an action; and that no sort of jurisdiction can be obtained against one who was dead when suit was commenced against him as a defendant, or in his name as plaintiff; and

¹¹⁷ 6 Am. St. Rep. 547.

¹¹⁸ *Jennings v. Sampson*, 11 N. W. R.

¹¹⁹ *Rand v. Holmes*, 147 Mass.

¹²¹ 71

that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun; and that a judgment for or against him must necessarily be void.⁹³ Mr. Black says, "If an action is commenced in the name of a person already dead (as where the decedent is the nominal plaintiff, and one for whose benefit the suit is prosecuted is the real party in interest), or if one of several joint claimants is dead before action brought, it is held that the defendant must take advantage of the fact by plea in abatement, at the peril of being estopped by his silence, and the judgment for plaintiff will not be disturbed."⁹⁴ And this has been followed by the Supreme Court of West Virginia in *Watt v. Brookover*,⁹⁵ Brannon, J., observing that "the fact that defendant did not know of his death can make no difference as to this point." In *McMillan v. Hickman*⁹⁶ also, it has recently been decided that "where a suit is instituted in the name of a party who is dead at the time the suit is brought, and process is duly served upon the defendants, who suffer judgment to be rendered against them without pleading the death of the plaintiff in abatement in proper time during the pendency of the suit, the judgment so obtained is not absolutely void, but erroneous only, and such judgment, until reversed in one of the modes prescribed by law, constitutes a lien upon the real estate of the defendant, and may be enforced as other judgment-liens, and is not subject to collateral attack." But the rule laid down above, in accordance with Mr. Freeman's opinion, appears to be more sound on principle, and better supported on authority.⁹⁷ The same has been held generally in suits against a corporation, commenced after it has become extinct or dissolved.⁹⁸

It is settled law that even express consent of the parties cannot confer on a Court jurisdiction which it does not possess;⁹⁹ not even with regard to an appeal.¹⁰⁰ This was expressly recognized by their Lordships of the Privy Council in *Ledgard v. Bull*;¹⁰¹ Lord Watson, in delivering their Lordships' judgment, having observed that "when the

⁹³ 111 Fed. 241.

⁹⁴ 29 Am. 50.

⁹⁵ 17 W. Va.

⁹⁶ 100 W. Va.

⁹⁷ 100 W. Va.

⁹⁸ 100 W. Va.

100 W. Va. 100.

Mo. 100.

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111 Fed. 241.

Bank, 100 Am.

of

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Marsh, 4.

100 W. Va. 100.

100 W. Va. 100.

100 W. Va.

100 W. Va. 100.

judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him." Following this decision, their Lordships held the same in *Minakshi v. Subramanya*,¹ in which there was no subjective defect of jurisdiction, and the defect arose only from the circumstance that the appeal heard was not allowed by law; and Sir Richard Bagallay, in delivering their Lordships' decision, observed that "no amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists." These decisions have been followed in several cases. They were referred to in *Ladli Begam v. Raje Rabia*,² in which the defendants had objected to the court's jurisdiction in the original court, but on appeal by plaintiff did not urge it in the appellate court, and Birdwood and Jardine, JJ., said: "The circumstance that she (the defendant) did not do so would not clothe the District Court with a jurisdiction not given it by law. In a somewhat similar case³ the Calcutta High Court refused to interfere in the exercise of its general powers of superintendence under Sec. 35 of Act XXIII of 1861 and Sec. 15 of 24 & 25 Vict. c. 104. But we prefer to follow the decision of the Allahabad High Court in *Dabi Singh v. Hanuman*,⁴ in which Straight, J., observed that the objection to the jurisdiction was directly based upon the provisions of Sec. 622, and that the court could not refuse to take notice of it."

Mr. Hawes, in his work on the jurisdiction of courts, says: "Defects in the jurisdiction of a court over the subject-matter of a cause are fatal and cannot be waived. No act or consent of parties in such a case can confer jurisdiction" Neither consent nor long acquiescence of parties will give an appellate court jurisdiction over an appeal." When jurisdiction is by law conferred upon a court, only upon the existence of certain conditions, parties may not waive the conditions and thus confer jurisdiction.⁵ When consent cannot confer jurisdiction upon a judicial tribunal, it cannot be vested therein by the laches of a party.⁶ The defendant's appearance not cure the defect, if the foreign court had no jurisdiction

¹ L. R. XIV 1

² I. L. R. XII

³ *Drobo Mowee v. Hajji Mundul*, I W. R. 6.

⁴ I. L. R. III All 747.

over the subject and nature of the action ; as for instance when a judgment is given in respect to land situate in a foreign country.⁹ When a tribunal has not jurisdiction over the subject-matter, no averment can supply the defect; no amount of proof can alter the case. Neither the acquiescence of the parties, nor their solicitations, can authorize any court to determine any matter over which the law has not authorized it to act."¹⁰ In *Frankel v. Satterfield*,¹¹ the Delaware Supreme Court, speaking of a judgment passed by a court without jurisdiction, said: "No action on the part of the plaintiff, no inaction on the part of the defendant, can invest it with any of the elements of power or of vitality." In *Block v. Henderson*,¹² the Supreme Court of Georgia said: "Whenever a court has jurisdiction of the subject-matter of a suit, the defendant therein can waive the jurisdiction as to his person. But if the court has neither jurisdiction of the subject-matter nor of the person, no waiver by the defendant can give the court jurisdiction; when the Magistrate went outside of the limits of his jurisdiction, and undertook to hold his court, he neither had jurisdiction of the subject-matter nor of the person, and no waiver or agreement made before him outside of his jurisdiction could confer jurisdiction upon him."

174. The want of jurisdiction, except as regards subject-matter, may however be waived. It is a familiar principle that the judgment or decree of a Court of general jurisdiction cannot be collaterally questioned, except for want of authority over the matter adjudicated upon.¹³ Thus Mr. Black says: "We are told that it is only when a judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed."^{14 15}

The question as to the waiver of local jurisdiction has not yet received an authoritative decision in India. In the United

⁹ W.

¹⁰ Ann.
Towm C. Co., 111

¹¹ 19 Atl. R.
¹² 14 Am. R.

¹³ 42 Am.
Gratt.

¹⁴ 80 Am.
Lett., 24 Iowa 2
ng, 16 Ark 303.
¹⁵ Pratt, 5 Duer, 672.

¹⁶ Hobart v.
¹⁷ Bl. Jud

States, a judgment obtained in a district other than that of the defendant's residence, on an agreement between the parties agreeing to acknowledge the jurisdiction, was held to be void as against subsequent judgment creditors who obtained their judgments in the proper district.¹⁶ Mr. Black says, however, that "the better view appears to be that the defendant may waive this objection as to the jurisdiction."¹⁷¹⁸ Mr. Hawes says: "If the defendant resides out of its jurisdiction, he may waive the defect of want of jurisdiction over the person by a voluntary appearance, or the court may acquire it by personal service of process within the jurisdiction."¹⁹ In *Kansas City R. Co. v. Rodebaugh*,²⁰ the objection on the ground of want of local jurisdiction was held to be waived; and Clogston, C.J., in delivering the judgment of the Supreme Court of Kansas, said: "The defendant insists that it cannot be sued in the county of A., for the reason that it does not lease, own, or control any line of road in the city of A. This action was brought in a Justice's court, and appealed by defendant to the district court, where the case was tried upon the bill of particulars as filed in the Justice's court. Nowhere does the record disclose any objections to the jurisdiction of the court, either before the Justice of the Peace or the District Court, and the first objection made to the jurisdiction of the court was made in the motion for a new trial. This seems to us to be too late to raise that question. If the defendant desired to challenge the jurisdiction of the court, it ought to have done so at an earlier period in the history of this case."²¹

The same rule appears to apply to defects of personal jurisdiction. Mr. Hawes says: "If a court has jurisdiction of the subject-matter and over the person, and a defendant has some privilege, which exempts him from the jurisdiction, he may waive it, if he chooses to do so." And Mr. Herman also lays down that "a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject-matter." That such a defect of personal jurisdiction may be waived was held directly by a Full Bench of the Bombay High Court in *Manohar Bhivrar*,²² in which case the objection to the jurisdiction was based on the ground of the defendant being a Sirdar who, as such, was not subject to the jurisdiction of the Munsif's

Ra. and Co. v. Harris, 5

¹⁶ *Leach v. Kohn*, 36 Iowa, 144.
¹⁷ 111. Jud. 277.

¹⁸ 3 Am. '15

¹⁹ *Mellor v. B. East*, 10 Kan. 117.
North Missouri R. R. Co.
Shuster v. Egan, 11

²⁰ 111. Jud. 277.

²¹ *Horn v. Horn*, 67

²² 11 B. H. C. R., J. C., 274.

Court which passed the decree. The defendant had defended the suit, and on an application for the execution of the decree, contended that the decree was void. The District Judge overruled the contention, and on appeal Westropp, J., with the concurrence of Tucker and Warden, JJ., said: "Before the Munsif the applicant either did, or did not, raise the objection of want of jurisdiction. If he raised it, and the Munsif wrongly disallowed it, he ought to have appealed to the Judge; and there would have been a special appeal to this court. But if he did not raise it, he must be taken to have waived it; and it is certainly too late for him to raise it now, when the Munsif's decree is sought to be executed."

In *Posey v. Eaton*,²⁶ an order for sale of land was given by a Judge related to one of the parties, and the Tennessee Supreme Court said: "If the parties submit to the action of the Judge at the time, the incompetency is considered waived, and not available on a collateral attack on the judgment." In *Denning v. Norris*,²⁷ "the court held that, since the defendant had admitted the person presiding to be a Judge by a plea to the action, he was estopped afterwards to say that he was not a Judge."²⁷

It has been held that where the personal disqualification of a Judge has not been embodied in a statute, the want of jurisdiction resulting therefrom may be waived. The parties may in such a case, by a joint application to the Judge, suggesting the ground of recusation, expressly waiving all objections on that account, and requesting him to proceed with the trial or hearing, may give the Judge full power to proceed as if no objection existed. Even where jurisdiction is given by a statute expressly to a Justice, "who shall not be interested in the matter," it has been held that the words are merely declaratory of the Common law, and where an objection to a justice on the ground of interest is waived by the parties, the Justice has jurisdiction, and the objection of want of jurisdiction cannot afterwards be raised.²⁸ This waiver may be inferred from the absence of any objection from a party aware of the disqualification. A tacit prorogation is thus inferred against a plaintiff who brings his cause before a Judge who is known to him to be disqualified to try it; and against a defendant who, knowing the existence

of such grounds of recusation, appears, and without objecting offers defences in the cause, either dilatory or peremptory.²⁹ In New York it was held that a judgment by an interested Judge would be void, even though the parties tried the case on the merits with knowledge and without objection,³⁰ but the New Hampshire Supreme Court said in *Gear v. Smith*,³¹ that in such a case the objection would be considered as waived.

In *German Bank v. American Fire Insurance Co.*³², the action of the defendant Bank in appearing was regarded as voluntary, and therefore as a waiver of its rights to object to the jurisdiction of the Court.³³ It is a general principle that a defendant who voluntarily appears and answers, although the answer in terms reserves the right to object to the jurisdiction, is precluded thereby from objecting that the Court has not acquired jurisdiction of his person.³⁴ But a special appearance, entered for the sole purpose of taking advantage of defects or irregularities in the process or service, cannot be considered as a waiver of those objections.³⁵ If the defendant appears merely for the purpose of contesting jurisdiction, it will not estop the defendant from contesting that.³⁶ Mr. Freeman says: "It is obvious that any proceeding taken by a defendant for the purpose of obtaining relief from a judgment, on the ground that it was rendered against him without first acquiring jurisdiction over him, and any appearance made professedly for a special purpose, ought not to be held to give the court jurisdiction over the defendant, except to the extent of hearing and determining the question which he specially presents to it for consideration."³⁷

If a party protest against jurisdiction, he will not be estopped from contending against it, even if he do not retire from it and goes through the proceedings up to the end. In *Hamlyn v. Beateley*,³⁸ the defendant's counsel protested that a Judge had no jurisdiction to try the issue that had arisen without a jury, but did not withdraw or offer to withdraw from the conduct of the case. Kelly, C.B., overruled the contention, but on final appeal Lord Chancellor Selborne, with the concurrence of Lord Coleridge, C.J., and Brett, L.J., held that the trial was

²⁹ *Moses v. Julian*, 84 Am. Dec. 114.

12 Ark. 160.

6 Iowa, 406.

10 Wend. 167.

³⁰ *Chambers v. Clearwater*, 1 Abb. App. Dec. 341.

³¹ 9 N. H. 63.

³² 31 Am. St. Rep. 320.

³³ *Young v. Ross*, 31 N. H. 203.

³⁴ *Mahoney v. Pezman*, 4 Duer.

³⁵ *Ames v. Winsor*, 10 Pick. 207.

Campbell v. Swasey, 13 Ind. 77.

Michie v. Stark, 44 Mich. 22.

³⁶ *Wainwright v. Beers*, 130 Mass. 749.

Wright v. Andrews, 130 Mass. 140.

Wright v. Linton, 37 N. H. 9.

³⁷ *Fr. Jud.* 191.

³⁸ 6 Q. B. D. 63.

bad, and said: "Even in arbitrations, where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made." The same view has been taken by the American Courts. In *Avery v. Slach*,⁵⁷ it was held that a party who appeared and objected to the validity of process did not waive the objection by answering and going to trial on the merits after his objection had been overruled. That decision was approved of in a later case⁵⁸ in the same Court, in which Andrews, J., in delivering the judgment of the Court, said: "The principle has been applied in a great variety of cases, and there is substantial uniformity in the decisions to the effect that a party not properly served with process, so as to give the Court jurisdiction of his person, does not waive the objection or confer jurisdiction by answering over and going to trial on the merits after he has ineffectually objected to the jurisdiction, and his objection has been overruled."⁵⁹ It is contended, however, that the error in overruling the objection to the jurisdiction, where the party subsequently answers over and proceeds to trial on the merits, can only be corrected by a direct proceeding on error or appeal, and that the judgment, when the party has appeared and gone to trial on the merits, cannot be assailed collaterally for want of jurisdiction. Most of the cases which declare the doctrine that an answer and trial on the merits does not preclude a party who has objected to the jurisdiction from subsequently insisting that the Court had no jurisdiction of the person, were cases on appeal or error. The principle upon which the doctrine proceeds is, that a party who has objected to the jurisdiction, and whose objection has been overruled, is not bound, as was said by Harlan, J., in *Steamship Co. v. Tugman*,⁶⁰ "to desert the case, and leave the opposite party take judgment by default." It is difficult to see why a party proceeding under such circumstances should be permitted to raise the question on error, and not be permitted to assail the judgment collaterally in another State, where the judgment is set up as a binding adjudication. The Court does not acquire jurisdiction over the person by deciding that it has jurisdiction. If the acts of the defendant do not constitute a legal waiver of the objection, or a submission to the jurisdiction

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Jones v. Jones, 2 Am. Bl. Rep. 447.
Harkness v. Hyde, 94 U. S. 476.
Ex Co. v. Tugman, 106 U. S. 118.

v. Green, 4 Iowa, 94.
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 U. S.

so as to preclude raising the question on error in the State where the judgment is rendered, how can the same acts preclude the party from raising the question in another State in answer to the judgment." The final decision in this case was, however, in favor of the validity of the judgment, on the ground of an express statutory provision in Texas, to the effect that "the filing of an answer shall constitute an appearance of the defendant so as to dispense with the answer and service of the citation upon him," which was held to have become binding on the defendant by the very fact of his going to Texas State, and thus to bar his invoking the general rule in his favor.

175. In *Naro Hari v. Anpurnabai*,¹¹ an application for the execution of a decree passed by a Principal Sadr Ameen was, in his absence, disposed of by the Assistant Judge, who had been authorized to dispose of all his urgent work. In subsequent litigation as to certain property taken in execution, it was contended that the Assistant Judge's proceedings having been without jurisdiction, the execution was void, but the contention was negatived, and Mr. Justice West in delivering the judgment said¹², "Section 350 of the Code of Civil Procedure makes it plain that the law intends that an error as to jurisdiction shall be corrected in appeal, and if such an error is made to appear to the Court, it will be taken notice of at any stage of the case. In this case, there was a Court of further resort beyond the District Court to correct any error into which that Court might fall, and by a special appeal, A. could obtain any relief which the law allowed. In the case of *Manohar Bhivrar*,¹³ . . . it is clearly shown what course ought to be taken by a party who questions the jurisdiction. If that course is not taken, it is too late to raise the question when the proceeding has been carried to completion. In the English reports, there are many cases in which the acts and orders of Courts of limited jurisdiction have been allowed to be treated as void by a party concerned, where the circumstances necessary to give jurisdiction did not exist. The cases of *Welch v. Nash*¹⁴ and *Davidson v. Gill*,¹⁵ may be taken as

¹¹ Order in this case was for the stop of Act 13, Geo. III c. 78, which could be put in a proper state, while only the

ed only at a new highway of an old highway had been

¹² 1 L. R. XI
¹³ 1 L. R. XI
¹⁴ 11 B. H. C. R. 20

¹⁵ 8 East
¹⁶ 1 East, 64.

examples, where, though orders made by Justices had been confirmed by the Sessions, they were held no answer to actions of trespass, when it appeared that the orders had been made without jurisdiction. The Quarter Sessions could dispose finally of the appeal, but their authority being essentially limited, an order going beyond it was void. But in these and similar instances, it must be borne in mind that the case could not be carried up in a regular course of appeal to a court having general jurisdiction. Unless a prohibition should be granted, or the proceedings should be quashed on a *certiorari*, there was no other way to try the jurisdiction than by an action against those who made or acted on the order. An action of trespass is suggested by Martin, B., as the proper way of trying the validity of an order of a County Court in *Denton v. Marshall*.⁴⁶ Special jurisdictions, according to the English law, are circumscribed, (1) with respect to place, (2) with respect to persons, (3) with respect to the subject-matter of their jurisdiction—*Perkin v. Proctor and Green*,⁴⁷ and it is said in that case that, if there is a defect in any of these respects, ‘all is void and *coram non jndice* ;’ yet, as we have seen, there may be a submission to the jurisdiction by a person not subject to it, which is conclusive on the party. As to subject-matter, there seems to be no reason on principle, why, in India and for a Court having general jurisdiction, a question of jurisdiction arising on this point should not, at least as regards the party on whom the jurisdiction immediately bears, be concluded by submission or by failure to take the steps, which the law prescribes for getting rid of an erroneous order just as much as a question of personal jurisdiction. Every decree is a command to a person, and whether his possible ground of objection is that the Court has no jurisdiction to command him at all, or none to command him in the particular case and as to the particular subject-matter, seems to make no difference in principle. The public interest is, no doubt, concerned in Courts of inferior jurisdiction, such as Small Cause Courts, being restrained to the subjects placed by the law within their cognizance, but a District Court is a

⁴⁶ 32 L. J. Ex. 89.

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⁴⁷ W. L. R. 382.

Court of general civil jurisdiction. All persons and all property within the district are subject to it. If after a matter has come before it in appeal, and been disposed of, its order can in a subsequent proceeding be treated as a nullity on account of the defective jurisdiction of the Court, from which the appeal was made, or the original nullity of the order, against which relief was sought, there is no reason why the same thing should not be done after a further order in special appeal by the High Court. The order of the one Court as of the other binds a person generally subject to the jurisdiction until it is reversed or set aside, and can be questioned only in the ways provided by the law. In a recent case, the Master of the Rolls thought it a good answer to an application founded on the Court's having sold property without jurisdiction that there was a decree standing unreversed, and directing the sale, *Steed v. Preece*.¹³ The order, which if beyond the jurisdiction might have been got rid of by proceedings directed to that object, was not allowed to be canvassed in a collateral inquiry. The superior Courts in England long looked with extreme jealousy upon the particular jurisdictions, by which their own powers might be encroached on, and expressed themselves in language, which is not to be applied without caution to our system of courts organized in a regular gradation of dependence on the High Court. The rough method of treating the order of a court as no order at all, or of seeking by a suit to expel a person, whom that order has definitively placed in possession, has no proper application where no provision is made for such a proceeding, and where the order itself may be brought under review by precisely the same authorities, who will have to dispose of the suit brought to test its validity. By providing the one method of redress, the Legislature has tacitly excluded the other. It is commonly said that 'a question of jurisdiction may be raised at any time', where proceedings are laid down for determining the question, it should be 'any time in the course of those proceedings.' He, who, having an appeal and a special appeal on a question of jurisdiction, has not availed himself of those remedies, '*renunciat iure pro se introducto*.' The public interest is not concerned when the matter has once been placed before a Court having full jurisdiction over the person and the cause, and an omission to urge objections there is to be treated

when the proceedings have been completed as conclusive." The Calcutta High Court also appears to have taken a similar view in *Drobo Moyce v. Bipin Mundul*,¹ to which reference has already been made, and Markby, J., in delivering the judgment of the Court, said "The applicant took his chance of a decision in his favor in the court of the Collector, without in any way protesting against the jurisdiction. And though his conduct in this respect will not give that Court jurisdiction, still it is, in our opinion, sufficient to prevent him coming before this Court, and asking it to exercise its extraordinary powers of relief in his favor, by setting aside proceedings of which he was willing enough to avail himself so long as there was a chance of their turning out to his own advantage." In *Gopi Nath v. Blugunt Pershad*,² Mitter, J., in delivering the judgment of a Division Bench, said—"In the suit of 1860, there was no objection taken that the Munsif had no jurisdiction to entertain it, and therefore the parties being the same, it may be taken as conclusively decided by that suit as between them that the Munsif in that suit had jurisdiction to entertain it."

And an estoppel may arise even on account of the delay in urging the plea in the subsequent proceedings. In *Doma Soonduree v. Bepin Beharee*,³ a suit was brought to set aside a sale made in execution of a decree for rent given by the Collector of Beerbhoom, on the ground of fraud, and Kemp and E. Jackson, JJ., held that during the proceedings in that suit the plaintiff could not be allowed to impeach the sale for want of jurisdiction in the Court, as the objection of want of jurisdiction had not been taken in any of the prior proceedings, or even in the plaint in that suit. In *Nehora Roy v. Radha Pershad Singh*,⁴ proceedings in execution of a decree of the Gazeepur Court were for years carried on in the Shahabad Court, and in the end a suit was brought to impeach certain proceedings in execution, and after the issues were framed, an amendment of the issues was applied for on the ground of want of jurisdiction in the Shahabad Court, and the High Court held that the application to raise the objection as to the jurisdiction for the first time at that stage of the proceedings was rightly refused. Even in the American Courts, as a general rule, the parties who have had an opportunity to be heard and their privies are held estopped in collateral actions to deny the jurisdiction of the superior Courts in which the

¹ X W. R. 6.
² I. L. R., X Cal. 707.

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³ XIII W. R.
⁴ IV C. L. R. 363.

judgments were recovered,⁵³ unless it appears, in any case, on the face of the record that the Court had not acquired jurisdiction,⁵⁴ though the contrary was held in *Ferguson v. Crawford*,⁵⁵ and some other cases.

176. In *Mohammed Hossein v. Akhaya Narayn*,⁵⁶ the defendant objected to the jurisdiction in the first court, but took no objection to it in the Lower Court of Appeal, and Markby and L. S. Jackson, J. J., held that the High Court ought not to set aside the decision on the ground of the objection as to jurisdiction, and that the objection ought to be considered as waived. In *Naimudda v. Scott*,⁵⁷ the objection of jurisdiction was raised for the first time in special appeal, and the High Court held that it was taken at too late a stage. Certain cases were referred to, in which that objection had been admitted for the first time in special appeal, but in those cases, as Loch, J., pointed out, the question of jurisdiction was clear upon the pleadings, or from the admission of parties. In *Koylash Chunder v. Ashruf Ali*⁵⁸ a District Judge holding that the Lower Court had jurisdiction over the suit, remanded it for trial, and on second appeal from the judgment after remand, the defendant was not allowed to raise an objection as to the jurisdiction, on the ground that he had not appealed from the order of remand.

It is enacted by Sec. II of the Suits Valuation Act, 1887, that—

(1) Notwithstanding any thing in Sec. 578 of the Code of Civil Procedure, an objection that, by reason of the over-valuation or under-valuation of a suit or appeal, a Court of first instance or lower appellate Court, which had not jurisdiction with respect to the suit or appeal, exercised jurisdiction with respect thereto, shall not be entertained by an appellate Court unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

McCoy v. McCoy, 20 W. Va. 704.
Plum v. Howard Inst., 46 N. J. L. 211.
v. Haywood, 40 N. H. 434.
v. Madett, 103 Ind. 23.

⁵³ 26 Am. Rep. 540.
⁵⁴ 11 B. L. R. Ap. 41.
⁵⁵ 111 B. L. R. 283.
⁵⁶ XXII W. R. 101.

the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

- (2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section, and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court.
- (3) If the objection was taken in that manner, and the appellate Court is satisfied as to both those matters, and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but, if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.
- (4) The provisions of this section with respect to an appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under Sec. 622 of the Code of Civil Procedure or other enactment for the time being in force.

This provision is of a very comprehensive character. It was argued in *Krishnasami v. Kanaka Sabai*,⁵⁹ "that the section is intended to apply only in cases where the over-valuation or under-valuation is due to a mistake in estimating the value of the subject-matter, and does not apply to cases in which there has been a mistake in principle," but Sir Arthur Collins, C. J., and Shephard, J., held that "there is nothing to show that any distinction should be made according as the mistake was made in one way or another." In *Vasudeva v. Madhava*,⁶⁰ the suit was for the redemption of

⁵⁹ I. L. R. XIV Mad. 183.

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⁶⁰ I. L. R. XVI Mad. 726.

certain land on payment of a quarter of the debt for which the mortgage was made, and it was contended before the High Court that it could take cognizance of the appeal, as "the entire mortgage debt, which was taken by the Subordinate Judge to be the value of the suit for the purpose of jurisdiction, must be taken as the value which regulates the appeal," but Muttusami Ayyar and Wilkinson, J.J., said:—"That section only applies to cases in which the objection taken on appeal refers to the improper valuation of a suit by a Court of first instance or of appeal for jurisdictional purposes. It does not apply to a case like the present, in which we have to determine what was the real value of the subject-matter in the Subordinate Court. That was one-fourth of the mortgage-debt, and not the whole debt. The erroneous view taken by the Subordinate Judge is not rendered binding upon us by Sec. 11, because we are not now deciding whether or not he had jurisdiction, but whether an appeal lies to this Court."

Similar provisions have been enacted in some cases for avoiding the ordinary defects of a wrong exercise of jurisdiction by courts in certain cases not cognizable by them. The Punjab Tenancy Act⁶¹ thus provides that a Civil or Revenue Court may submit to the Chief Court the record of any case decided by a court under its control, which it may think fell within the cognizance of a Revenue or Civil Court respectively, and the Chief Court may, if it appear to it on perusal of the record that it was so decided in good faith and that the parties have not been prejudiced by the mistake as to jurisdiction, order that the decree be registered in the court which had jurisdiction; and that the Chief Court may pass the same orders as to any such decision of a Civil Court even otherwise than on the aforesaid submission of the record; and that every such order passed by the Chief Court shall be conclusive not only against the parties but also against persons who were not parties to the suit or proceeding.

177. As to the jurisdiction of particular Courts in individual cases, the general rule appears to be, that the existence of the jurisdiction will be presumed in the case of a Court of general jurisdiction, but no such presumption is allowable in regard to a Court of limited jurisdiction. The Supreme Court of Illinois in *Swearengen v. Gulick*⁶² said: "That in

Presumption as to the existence of jurisdiction in regard to the Courts of general jurisdiction.

⁶¹ 174th Sec. 100 Act XVI of 1897.

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⁶² 67 Ill. 212.

relation to superior courts, or courts of general jurisdiction, nothing is to be presumed to be out of their jurisdiction but that which specially appears to be so, but, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is specially alleged." Similarly, the Maryland Supreme Court in *Clark v. Bryan*,⁶³ after observing that a judgment manifestly rendered without jurisdiction will be void, whether the tribunal which pronounces it be an inferior court of limited and special jurisdiction, or a superior court of record, proceeding according to the course of the common law, said that the distinction was "that with regard to the former, the jurisdiction cannot be presumed, but must be shown affirmatively, on the face of the proceedings, while with reference to the latter, when called collaterally in question, every intendment and preservation is made in their support, and the judgment is conclusive unless it manifestly appear upon the face of the record that the court acted without jurisdiction." In *Stewart v. Anderson*,⁶⁴ the Texas Supreme Court said:—"It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the Court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have been done, before the court assumed the power to render a final judgment. In either case the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact that to have done otherwise, would have been a breach of duty, which is never presumed from the doing of an act that may have been legal."

There is no general accord, however, as to the distinction between the Courts of the general and those of the limited jurisdiction. In *Mulchand v. Suganchand*,⁶⁵ Green, J., said, "The High Courts are not courts of ordinary original civil jurisdiction over the whole territories of the Presidencies to which they belong. Though, in some respects, their original civil jurisdiction is wider than that of the District Courts, yet it is limited, and there is no presumption in favour of jurisdiction beyond

⁶³ 16 Md. 176.

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⁶⁴ 6 B. W. R. 295.

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⁶⁵ 1 L. L. R. 1.

what is to be found expressly conferred by the Charters of constitution.” On the other hand, Mr. Black observes⁶⁶ that, “although a Court may be an inferior or limited tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect to that subject will be sustained by the same liberal presumptions as to jurisdiction which obtain in the case of the superior courts.”⁶⁷ Baldwin, J., in delivering the judgment of the United States Supreme Court in *Grignon v. Astor*,⁶⁸ said: “The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this,—a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities.” In *State v. Daniels*,⁶⁹ it was said that the question of inferiority might “be solved by showing that the court is either placed under the supervisory or appellate control of those named, or that the jurisdiction conferred upon it is limited and confined. Conceding that the Act in question does not place the court which it creates under the supervisory control of the circuit court, and only allows appeals and writs of error to be prosecuted directly to the Supreme Court, yet it will still be an inferior tribunal if its jurisdiction is limited and inferior. General jurisdiction is that which extends to a great variety of matters. Limited jurisdiction, also called specific and inferior, is that which extends only to certain specified causes.”⁷⁰ In

Bumstead v. Read,⁷⁰ the New York Superior Court said: "To constitute a Court a superior court (within the meaning of the rule), as to any class of actions, its jurisdiction of such

action by the usual form of common-law or of Chancery practice, the proceedings and judgments of the Court will have all the characteristics of the proceedings and judgments of Courts of Record.⁷¹ In *Carleton v. Washington Ins. Co.*,⁷² the judgments of Courts of Superior Jurisdiction while acting within statutory limits were held open to examination, where all things necessary to the jurisdiction did not appear on the record. In *Pulaski Co., v. Stuart*,⁷³ the Supreme Court of Virginia said: "When a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached. So also when a Court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised *judicially*, that is, according to the course of the common-law and proceedings in Chancery, such judgment cannot be impeached collaterally. But where a Court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common-law, its action being ministerial only, and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear on the face of the records." In *Morse v. Presby*,⁷⁴ the New Hampshire Supreme Court held that where a court of general jurisdiction might have special and summary powers, wholly derived from statutes not exercised according to the course of the common-law, and not belonging to it as a court of general jurisdiction, its decisions would be treated like those of courts of limited and special jurisdiction, and the jurisdiction, both as to the subject-matter and the parties, must appear by the record, and everything presumed to be without the jurisdiction which should not appear distinctly to be within it. This decision was approved in *Galpin v. Page*⁷⁵ by the United States Supreme Court, and in *Ferguson v. Jones*⁷⁶ by the Oregon Supreme Court, which had held the same before also in *Northcutt v. Lemery*.⁷⁷ It has even been held that such special proceedings are void, unless the record shows an express finding of each jurisdictional fact. Thus in *Mason v. Sawyer*⁷⁸ the appointment of a minor's guardian by the Court of Common Pleas, and a sale by him of the minor's land was held void on proof of the minor having been resident in another country. Similarly the Tennessee Supreme Court has held that a judgment in favor of a surety must recite all facts necessary to give jurisdiction,⁷⁹ and the same is necessary in the case of a sale by an administrator.⁸⁰ In support of this view it has been said: "There is the same reason for presuming that a superior court, acting ordinarily, does not exercise any thing but its ordinary jurisdiction—that is, does not exercise a special jurisdiction conferred by statute, and not existing, therefore, except by the statute that there is for presuming that inferior courts having nothing but statutory jurisdiction are without jurisdiction in any special case, unless it is shown by setting forth the jurisdictional facts."⁸¹ The doctrine that the judgments of courts of record are of any less force, or are to be subjected to any closer scrutiny, or that they are attended with any less liberal presumptions, when created by virtue of a special or statutory authority, than when rendered in the exercise of ordinary jurisdiction, has been repudiated in some of the States.⁸² Mr. Vanfleet says: "Such cases are not in accord with sound reasoning or public policy. No one has ever yet assigned any reason why a court is not just as competent to decide a special proceeding as a common one, nor why it should be presumed that the Court did its duty in determining jurisdictional facts in a common proceeding but not in a special one. The duty and the power being the same in both, it seems to me the presumptions should be the same in both."⁸³ In support of this view, the Supreme Court of Wisconsin in *Falkner v. Guild*,⁸⁴ said that the "presumption in favor of the regularity of the proceeding of such courts, is founded on the character of the court itself. And that character is the same, whether it act under a special statute, or under the common-law."

⁷⁰ 31 Barb.

⁷¹ *Harvey v. Fyler*, 2 Wall., 42.

⁷² 35 N. H., 162.

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⁷⁴ 25 N. H., 352.

⁷⁵ 13 Wall., 370.

⁷⁶ 11 Am. St. Rep.

⁷⁷ 4 Or. 317.

⁷⁸ 12 Ohio,

⁷⁹ *Jones v. Read*, 1 Humph., 374.

⁸⁰ *Kendall v. Titus*, 6 Hark., 727.

⁸¹ *B'nto v. Lewis*, 22 N. J. L., 74.

Newcomb v. Newcomb, 26 Am. Rep., 222.

Hahn v. Kelly, 94 Am. Dec.

⁸² Wells, 403.

Law, Coll. Att.

10 W. a., 472.

actions must be unconditional, so that the only thing essential to enable the Court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties." In *Kemp's Lesse v. Kennedy*,⁸⁵ Chief Justice Marshall in delivering the judgment of the United States Supreme Court, speaking of the Court of Common Pleas for the County of H., New Jersey, said: "Such a court is not only one of limited jurisdiction, but its jurisdiction of every action—of the action itself, being made to depend either upon the place where the defendants reside, or the fact that they are personally served with the summons within a designated locality smaller than a county, it is an inferior court within the Common Law meaning of that term. If the court had a general jurisdiction of an enumerated class of actions, without reference to the place where they arose, or the parties to them resided, or to the amount sought to be recovered, being a Court of record, and proceeding according to the general course of the Common Law, it might be *quo ad hoc* within the meaning of the rule under consideration."

There is a conflict of opinion even as to whether Probate Courts are of general or limited jurisdiction. Mr. Wells says: "A Probate Court, as to the settlement of the accounts of an administrator, guardian, &c., is held to be a general court, with full and exclusive powers. But it has also been held that as to its power and jurisdiction to order and direct the sale of lands to pay debts, these are special and limited, because, while it may and must settle the accounts of administrators, in all cases, it can only order and direct the sale of lands in special cases, and under peculiar circumstances; and by the Common Law an executor or administrator had no power over real estate, and there are special conditions on which the limited power to divest the heir or devisee of his interest therein, and to enable the administrator or executor to sell it, depend."^{85a} This distinction does not appear to have been recognised or maintained in later cases. In *Goodwin v. Sims*,^{85b} Clopton, J., in delivering the judgment of the Alabama Supreme Court, said "that the jurisdiction of the Probate Court to order the sale of the lands of a decedent is statutory and limited; and that it must appear from the record, has been placed, by the repeated decisions of this court, beyond the pale of discussion. No intendments will be made in favor of the jurisdiction from

⁸⁵ 5 Cranch, 173.^{85a} Wells Rec. Jud. 409.^{85b} 11 Am. St. Rep. 21

its mere exercise." In Rhode Island, Connecticut, Vermont, and some other States, Probate Courts have been held to be generally of a limited jurisdiction.⁸⁶ In Missouri, New Hampshire, Georgia, Arkansas, California, and some other States, they are treated as courts of general jurisdiction, and their orders and judgments held entitled to the same favorable presumptions as are accorded to those of superior courts.⁸⁷

Justices' Courts are in most States treated as Courts of inferior jurisdiction,⁸⁸ but in Texas even they are deemed Courts of general jurisdiction.⁸⁹ Thus in *Heck v. Martin*,⁹⁰ Hobby, J., in delivering the judgment of the Texas Supreme Court said: "The rule is well recognized in this State that Justices' courts, being created by the constitution, are within their defined limits tribunals of general jurisdiction, and as such all reasonable presumptions should be indulged in support of the validity of their judgments." Mr. Vanfleet lays down as a general rule that the proceedings of Probate Courts, of County Courts and County Commissioners or Supervisors in respect to county-matters, boards for the assessment or revision of taxes, and justices of the peace in actions between landlord and tenant for the possession of land, being unlimited and generally exclusive, should be classed with those of superior courts, and all intendments made in their favor.⁹¹ I beg to submit that the same rule should, on general principles, apply to courts of so-called general jurisdiction except in regard to matters as to which the jurisdiction is limited.

There is no difference of opinion, however, as to the correctness of the general rule. In *Wright v. Douglass*,⁹² Mr. Justice Gridley said "that in a Court of general jurisdiction it is to be presumed that the Court has jurisdiction till the contrary appears." The preponderance of authority certainly is in favor of the view that "it is a matter of no consequence whether jurisdiction

⁸⁶ *People's Savings Bank v. Wilcox*, 2 Am. St. Rep. 594.

Johnson v. Beazley, 27 Am. Rep. 270.
Roderigas v. East River, 20 Am. St. Rep. 557.
Townsend v. Townsend, 94 Am. Dec. 186.
Wattles v. Hyde, 9 Conn. 10.
Bears v. Terry, 28 Conn. 273.
Halden v. Scanlan, 30 Vt. 177.
Jochimsen v. Suffolk Savings Bank, 3 Allen.

Camden v. Plam, 91 Mo. 117.

Rowden v. Brown, 91

Price v.

Am. St. Rep.

Sherwood v. Baker, 24 Am. St. Rep. 309.

Kimball v. Flak, 75 Am. Dec. 213.

v. Lindsey, 71 Am. Dec. 117.

Tucker v. Harris, 54 Am. Dec. 485.

Apel v. Kelsey, 20 Am. St. Rep. 183.

Borden v. State, 54 Am. Dec. 217.

Schultz v. Schultz, 60 Am. Dec.

Singerly v. Swain, 75 Am. Dec. 1

⁸⁸ *Tableman v. Hildebrandt*, 72 Cal. 313.

Washington v. Black, 43 Cal. 290.

Smith v. Bis-Calloz, 43 Cal. 345.

Holden v. Lathrop, 63 Mich. 652.

McDonald v. Prescott, 90 Am. Dec. 217.

⁸⁹ *Williams v. Ball*, 26 Am. Rep. 730.

Holmes v. Buckner, 67 Tex. 107.

⁹⁰ 16 Am. St. Rep. 915.

⁹¹ *Law Coll. Att.*

⁹² 10 Barb. 111.

of the Court affirmatively appears upon the judgment roll or not, for if it does not it will be conclusively presumed."⁹³ Mr. Black observes that "the result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes."⁹⁴ In *Pratt v. Dow*,⁹⁵ the Court concurred in the doctrine, that "a domestic judgment of a court of record of general jurisdiction, proceeding according to the course of the common law, cannot be impeached by the parties to it, where a want of jurisdiction is not apparent upon the record, while it remains neither annulled nor reversed."

Of course, where the record taken together shows affirmatively that the court had not jurisdiction of the cause, that is where the record contains express averments respecting jurisdictional facts which show that in law jurisdiction was not acquired, the judgment will be null and void.⁹⁶ In *Hahn v. Kelley*,⁹⁷ the California Supreme Court said: "What do the cases mean when they speak of a want of jurisdiction appearing upon the face of the record? Do they mean a positive and direct statement to the effect that something which must have been done in order to give the court jurisdiction was not done? Or do they mean that a want of jurisdiction appears whenever what is done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction? If the former, they are a delusion, and the respondents and others in like circumstances may well characterize them as cases

'That palter with us in a double sense,
That keep the word of promise to our ear,
And break it to our hope.'

For we venture to say that no case can be found, or will arise hereafter, where the conditions contemplated by such a rule will be found to exist. No Court has ever yet so far stultified itself as to render a judgment against a defendant, and at the same time deliberately state that it had not acquired jurisdiction over his person. Suppose, in a case of attempted personal service, the officer should return that he had served the summons on A. B., the son of the defendant, by delivering

⁹³ West, 100 Mo. 379,
⁹⁴ Smith, 110 Ind. 239.

Williams v. Haynes, 19 Am. St. Rep. 732,
84.

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Pemberton R. Co. v. Weeks, 52 Maine, 470,
⁹⁶ 94 Am. Dec. 742.

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to him personally a copy, and also a copy of the complaint, and the remainder of the record is silent upon the question of service. Could we presume, in the face of such a record, that he served it on the defendant also? Undoubtedly not. There would be a want of jurisdiction upon the face of the record, within the rule in hand, and the judgment would be declared a nullity whenever and wherever presented in support of a legal claim or right. We consider the true rule to be that legal presumptions do not come to the aid of record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; but when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three."

The Texas Supreme Court has repeatedly recognized both the rule and the exception. In *Murchison v. White*,⁹⁷ the Court said: "In collateral proceedings, the only contingency in which the judgment of a domestic court of general jurisdiction can be questioned is where the record shows affirmatively that its jurisdiction did not attach in the particular case. In *Williams v. Haynes*,⁹⁸ Collard, J., in delivering the judgment of the Court, said "It is settled that a judgment of a court of competent jurisdiction cannot be collaterally impeached unless the record affirmatively shows the want of jurisdiction. Even where a part of the record—the citation and its return—shows that service could not have been had, the judgment of a Justice of the Peace reciting that the defendant wholly made default, and that he "was duly served with process" was held not impeached. In *Wilkerson v. Schoonmaker*,⁹⁹ Henry, A.J., in delivering the judgment of the same court said: "By repeated decisions it has been announced by this court that a domestic judgment of a court of general jurisdiction upon a subject-matter within the ordinary scope of its power and proceedings is entitled to such absolute verity that in a collateral action, even where the record is silent as to notice, the presumption, when

not contradicted by the record itself, that the Court had jurisdiction of the person also, is so conclusive that evidence *aliunde* will not be admitted to contradict it.¹⁰⁰" In *Galpin v. Page*,¹ Mr. Justice Field said, "Whenever it appears from the inspection of the record of a court of general jurisdiction, that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

This was cited with approval by Strahan, J., in *Furgeson v. ones*,² in which also one of the parties was a non-resident; and the record being silent, the Court said: "In such case, there can be no presumption that jurisdiction over his person was acquired." In *Rand v. Hanson*,³ Knowlton, J., in delivering the judgment of the Massachusetts Supreme Court observed that "the presumption in favor of the validity of a judgment does not extend to a case where it appears from the record that the defendant was a non-resident, and it does not appear that service of process was made upon him within the State." The decision in *Hargis v. Morse*,⁴ is not against this view, as there it was only held that "until it appears, not merely that the papers are gone, but also that there is no secondary proof of their contents, there is no presumption, even in favor of a Court of general jurisdiction, from the existence of one part of a record, that the remainder would, if produced, contain the facts necessary to give the Court jurisdiction." In *Howard v. Thornton*,⁵ the Supreme Court of Missouri even said, that "if the whole record, taken together, does not show that the Court had jurisdiction over the defendant, then the judgment would be nullity;" but the real question in that case was, whether a judgment could be impeached without producing the whole record. The observation made is certainly true of a Court of limited jurisdiction, however, and where one seeks to enforce the judgment of such a Court, its organization must be established.⁶

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Tennell v. Breedlove, 54 Tex. 341.
Lewler v. White, 27 Tex. 280.
1 18 Wall. 320.
2 11 Am. St. Rep.
3 26 Am. St. Rep.

4 Deener v. Shaw, 22 N. H. 277.
Morse v. Presby, 26 N. H.
5 7 Kan. 417.
6 50 Mo. 391.
v. Howard, 30 Mo.

In *Ferguson v. Crawford*,⁸ Rapallo, J., after observing that "there are many cases in other States, and in the Courts of the United States, containing expressions general in their character, which would seem to sanction the doctrine, that a want of jurisdiction over the person or subject-matter may in all cases be shown by extrinsic evidence," says "An examination of these cases discloses that they all relate either to judgments of inferior Courts, or Courts of limited jurisdiction or Courts of general jurisdiction acting in the exercise of special statutory powers, which proceedings stand on the same footing with those of courts of limited and inferior jurisdiction, or courts of sister States, or to cases where the want of jurisdiction appeared on the face of the record, or to cases of direct proceedings to reverse or set aside the judgment. . . . After considerable search I have been unable to find a single authoritative adjudication, in this (New York) or any other State declaring that in the case of a domestic judgment of a Court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighbouring States holding that, in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the Court over the person as well as the subject-matter, unless it appear on the face of the record that the Court had not acquired jurisdiction, and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party." In *Edgerton v. Edgerton*,⁹ it was alleged that the defendant had by threats and menaces compelled plaintiff (his wife) to write and sign a letter of authority to an attorney, authorising him to appear as her counsel in an action which the defendant proposed to commence against her for divorce, and that on her active protest against it, the defendant with intent to deceive her told her that he had destroyed it, while as a fact he delivered it to the attorney who on that account appeared in the action brought by defendant against her, and the court thus believing to have acquired jurisdiction over her, passed a decree against her without even her knowing of the action; and it was contended that evidence of these facts could be given in a subsequent action by her against the defendant for alimony, to show that the

decree of divorce was void on the ground of want of jurisdiction. The Montan Supreme Court over-ruled the contention however, and Mr. Justice Harwood, in delivering the judgment of the Court, said: "It may be safely said to be almost uniformly settled now that domestic judgments of courts of general jurisdiction, valid on their face, cannot be collaterally attacked in courts of the same State by showing facts *aliundi* the record, although such facts might be sufficient to impeach the judgment in question if brought to bear upon it in a proper proceeding. The proposition in this case appears to be to open a way through said decree of divorce for the progress of this action, by going back of that judgment, and raising a question as to the good faith and lawfulness of the plaintiff's conduct in obtaining it. Such a practice cannot be sustained. It is needless to go into a discussion of the reasons, and the public policy which forbid such a rule. These are fully developed in the authorities."⁹⁹

In regard to the Courts of limited jurisdiction there is a conflict of opinion as to whether the jurisdiction must appear from the record, or evidence may be produced *aliundi* of any of the facts required to give jurisdiction to the court in any case. The affirmative view has been taken in New York, Mississippi, California, Colorado, and some other States.⁹ The negative view has been taken in Tennessee, Missouri, Michigan and some other States.¹⁰ In the case last cited, the summons on the defendant had been served by a private person, and the record did not show his competency, and Grant, J., said: "This Court has too often decided that under a record such as this, before the amendments were made, justices of the peace obtain no jurisdiction, and that their judgments are null and void, to render any discussion or citation of authorities necessary. It is equally well settled that proof of service of process, to give the Courts jurisdiction, cannot rest in parol. Courts have liberally construed the statute of amendments in

⁹⁹ *Hahn v. Kelly*, 94 Am. Dec. 742.

Carpentier v. Oakland, 1, 9.

W. v. Clark, 34 Mo.

W. H. Co. v. Weeks, 52 Mo. 400.

W. Gr. Mm., 16 Iowa 532.

W. Killam, 82 Am.

W. v. Haven, 79 Am. Dec. 244.

W. v.

W. v. N. 457.

W. v. Gulp, 11.

W. v. Horner, 40 Am. Dec. 353.

W. v. Stonebraker, 34 Mo. 172.

W. v. Pratt, 2 Hull, 64.

W. v. Blackmark, 60 Am. Dec.

W. v. Morrill, 23 Am. St. Rep.

W. v. Van Dusen v. Sweet, 31 N. Y. 378.

W. v. Cammack, 61 Am.

W. v. Binford, 11 Meak. 310.

W. v. Sprague, 23 Mo. 410.

W. v. N. v. N., 20 Am. St. Rep.

matters of form, where it is clear that no injustice can be done ; but amendments without which the Courts obtain no jurisdiction to try the case can only be made by the Court which tried the cause, and upon notice to the opposite party." The learned editors of the American State Reports lay it down, as the correct rule, "that such jurisdictional facts must affirmatively appear from the record, in order to show that the Court had jurisdiction, as are required to so appear by the statute ; and that as to all others, although the record is silent on the subject or defective in its showings, proper evidence *aliunde*, tending to show that the Court had actual jurisdiction, is admissible ; and this is the doctrine established by the weight of authority as shown by those cases wherein the question has been directly adjudicated."¹¹

In *Behymer v. Nordloh*,¹² it was contended that "as the amount and nature of the debt sued for was required to be shown, its omission was a fatal jurisdictional defect, but it was held that the omission might be supplemented by proofs *aliunde*." In Virginia it is expressly enacted that service of process upon an officer of a corporation shall be in the county or corporation in which he resides, and that "the return shall show this, and state on whom and where the service was; otherwise the service shall not be valid." In *Shenandoah Valley Ry. Co., v. Ashby*,¹³ the return did not show that, on which account there was no service at all, but a judgment *ex-parte* was passed, and long after, the return was allowed to be amended so as to show valid service, and the Virginia Supreme Court held that the amendment was right, and the judgment became valid and unassailable, Lewis, P., observing that "the case is not within the principle that proceedings which are void *ab initio* cannot be rendered valid by amendment, for here the effect of the amendment was, not to confer jurisdiction upon the Circuit Court, but only to perfect the proof of the jurisdiction which it had previously acquired, but of which the evidence prescribed by the statute was wanting. In other words, the amendment, by relating back to the original return, and becoming, in effect, a part of it, shows, in the prescribed form and manner, that the defendant company was duly served with process, and hence had notice and an opportunity to be heard, which are essential requisites to the jurisdiction of all Courts."

¹¹ 20 Am. St. Rep. 621.¹² 12 Cal. 352.¹³

The Texas Supreme Court appears to take a still more liberal view. In *Bumpus v. Fisher*,¹⁴ the Court said that "the rule with respect to Courts of limited jurisdiction that every thing must appear on the record strictly and affirmatively which will give them jurisdiction to hear and determine is rapidly giving way by the application to our Courts, as they are actually constituted, of the same principles which originally formed the rule with reference to their own Courts in England." In *Williams v. Ball*,¹⁵ the judgment entry was silent upon the question of notice to the defendant, and he testified that he had not been served, and the Supreme Court said: "To hold these titles void, unless the record shows affirmatively all the necessary facts, would virtually defeat many of them, involve the country in litigation, and would be contrary to repeated rulings of this Court, which hold that such proceedings should be liberally construed. Judgments of justices of the peace, when apparently within the ordinary scope of their power and jurisdiction cannot, as was sought to be done in this case, be collaterally attacked as being void for the reason that they do not show affirmatively all the facts necessary to have given the Court jurisdiction. If in such cases generally the testimony of the defendant be admissible—which we do not now concede—to prove that in fact he was not served with process, yet in the case under consideration we cannot say that the Court erred in not holding it sufficient to overturn the presumption in favour of the regularity of the judgment." In *Wilkinson v. Schoonmaker*,¹⁶ Henry, A. J., after referring to these cases, said that they "are authority for holding that it is not necessary for everything to affirmatively appear in the record of a Justice's judgment which is required to exist to confer upon them jurisdiction with regard to the person or to the subject-matter." While the opinion in the case of *Williams v. Ball*, contains expressions capable of being construed as deciding that the Courts of Justices of the Peace should, under our constitution, be treated as Courts of general jurisdiction, we do not think it was intended to decide more than that in the absence of recitals every presumption in favour of their validity must be indulged, and that they will not be held void merely because every fact necessary to give the Court jurisdiction does not affirmatively appear in the record. Evidence *aliunde* was heard

both in *Bumpus v. Fisher* and in *Williams v. Ball*, and it was not decided to be inadmissible in either case."

178. There is a general presumption in favor of the Presumption in favor of existence of all the jurisdictional facts, of existence of jurisdictional facts. of all the facts on the existence whereof the existence of jurisdiction depends in any case. Thus even when there is no express finding on the record as to any such fact, it will be presumed on a collateral attack, that the Court acted correctly and with due authority, as if every fact required to give jurisdiction affirmatively appeared.¹⁶ If a statute require a certain affidavit to be filed or a certain fact to be found prior to the rendition of a judgment, it will be presumed, in the absence of any allegation or evidence to the contrary on the record, that such affidavit has been filed¹⁷ or such fact found.¹⁸ The Supreme Court of Indiana in *Jackson v. State*,¹⁹ said: "Where a Court of general jurisdiction assumes jurisdiction, the existence of all facts necessary to confer jurisdiction is presumed to exist." By way of explanation of this view, the Court said in *Ney v. Swinney*,²⁰ that judicial action was an adjudication not only of the facts actually determined, but also of all precedent matters which should have been determined; and recently it said in *Osborn v. Sutton*,²¹ that "the assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction." Similarly the California Supreme Court in *Clary v. Hoagland*,²² observed that "the first point decided by any Court, although it may not be in terms, is that the Court has jurisdiction, otherwise it would not proceed to determine the rights of the parties." In *Thornton v. Baker*,²³ the Supreme Court of the Rhode Island said: "Where jurisdiction depends on the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact."²⁴ In *Wyatt's Adm'r v. Steele*,²⁵ the Alabama Supreme Court said that "the court's action implied the previous

¹⁶ *Patterson*, 57 Am. Dec. 643.
¹⁷ *Bank of Brownsville*, 53 Am. Dec.

Hahn v. Kelly, 94 Am. Dec. 742.
Brown, 57 Ala. 533.
Commiskey v. Commiskey, 149 Pa. St.
Exchange Bank v. Ault, 102 Ind. 322.
Newcomb v. Newcomb, 20 Am. Rep. 222.
v. Harold, 62 Mo. 516.
v. Gordon, 93 Mo. —

¹⁹ 3 N. E. R.
Id. to same effect. —
Bump v. Gay, 9 N. E. R. 120.
²⁰ Ind. 454.

²¹ 9 N. E. R. 410.

²² 2 Am.
²³ *Erwin v. Lowry*, 7 How.

²⁴ *Voelker v. Brock*, 64 Mo. 674.

ascertainment of the preliminary jurisdictional facts, and that its decision on those facts could not be called in question, collaterally." An order given by a court for a sale of land by an administrator has often been held to imply and involve a conclusive finding by the court as to the existence of every circumstance without which the court was not authorized to give that order.⁶⁶ In *Richards v. Skiff*,⁶⁷ the defendant was not allowed even to prove that at the time of the judgment, he was only two years old, and that the summons had not been served upon him.

On the same principle, it has, sometimes, been held that in cases in which the appearance of an attorney on behalf of a defendant is held to estop the defendant from objecting to the want of jurisdiction,⁶⁸ the authority of the attorney cannot be denied or contradicted, because the Court acts judicially in determining the authority of the person to appear, and the power to decide the merits necessarily carries with it the power to decide all preliminary matters; and an error in the determination of any such point cannot make the proceedings void.⁶⁹ In *Holbert v. Montgomery's Adm'r*,⁷⁰ it was held directly that the plaintiff could not show collaterally that his attorney had no authority, as the court necessarily passed upon his authority at the time. In *Hamilton v. Wright*,⁷¹ the rule was justified on the ground, "that the law warrants a party in giving faith and confidence to one who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in the courts," and "in various ways, to set aside proceedings at the end of a protracted litigation would be to work inevitable wrong to the party who had relied upon an appearance." Speaking of the contrary doctrine, Mr. Vanfleet says, that "it overturns the very foundation of all judicial proceedings—namely, that a domestic record must be tried collaterally by inspection only, and that the only plea of fact allowed against is *nul tiel record*."⁷² In England also, it was laid down in an early case⁷³ that "when an attorney takes on himself to appear, the Court looks no further, but proceeds as if the attorney had

and *Barton*, 2 Wall. 210.
in Burch, 30 Am. Dec. 407.
6 Ohio, 350.
Brown v. Nichols, 42 N. Y. 36.
v. Leonard, 83 Am. Dec.
maker, 34 Mo. 173.
v. Oakland, 20 Cal. 439.

Morton v. Orino, 39 Mich.
 79 Feb. S. 170.
 81 5 Dana 11.
 81 37 N. Y. 204.
 81 Law Coll. Att.
 231 Soth. 80.

sufficient authority, and leaves the party to his action against him." Such a rule could not but operate harshly in some cases, and it was therefore at first restricted, and has of late been over-turned, at least, to a considerable extent. Thus in *Wiley v. Pratt*,⁵¹ the Indiana Supreme Court summing up the authorities said: "While, however, a party is permitted to controvert the authority of the attorney to appear for him when he was without the jurisdiction of the court rendering the judgment, and, upon establishing the fact that the appearance was unauthorized, is relieved from the enforcement of the judgment, this relief will not be granted where the defendant was within the jurisdiction of the court, and an unauthorized appearance has been entered for him by counsel, unless he can establish a defence on the merits to the cause of action in which the judgment was rendered." Even in *Hamilton v. Wright*, it was expressly admitted that "the rule should yield to equitable considerations where they arise, and should permit the Courts to give relief when they can, thereby prevent irremediable wrong to either party." In England, Rolfe, B., observed in *Bayley v. Buckland*,⁵² that "the non-responsibility, or suspiciousness of the attorney, is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may notwithstanding be ruined. It is true that the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and the possible loss of costs." In a leading case in the American Courts, Judge Dillon observed that there was for the rule "no foundation in reason to stand upon. It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by the judgment of a Court without a day in Court. It relieves the other party of the duty which in reason belongs to him, viz., to serve his process and to see at his peril that his adversary is in Court. It carries out this unsoundness by compelling the wrong party to look to the attorney. True reason and logic would say, if an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act if never ratified or promptly disowned; and if the adverse party, being ignor-

⁵¹ 23 Ind. 635.⁵² 1 Exch. 1.

ant of the want of authority and carelessly omitting to serve process or to require the attorney to show his authority, has been damaged, he and not myself should be the one to look to the attorney." There also, the weight of authority now is in favor of the view, that the authority of the attorney may be contradicted,³⁶ though the burden of proving that the appearance was unauthorized will be on the defendant. And it may now be looked upon as settled there, that if the record, with a view to show jurisdiction, recites the defendant's presence by an attorney in court, the defendant may show that the attorney's presence was unauthorized, and therefore fraudulent, and the judgment therefore without jurisdiction against the defendant.³⁷ In *Conery v. Rochford*,³⁸ it was even allowed to be shown that the agent who appeared had authority only to confess for the firm and not for its members, and thus to avoid the judgment passed against the members. Nor is this rule restricted in its application to courts of general jurisdiction. The learned editors of the American State Reports say: "Though the Court is one of inferior jurisdiction, if it has authority to inquire concerning the existence of some jurisdictional fact and to determine whether it existed or not, its determination on this subject is as conclusive as upon any other, and cannot be assailed collaterally, and such determination need not appear in express terms, but will be implied, if the tribunal proceeded to take such action as could properly be taken only after it had made the requisite inquiry and found that the jurisdictional fact existed."³⁹ ^{39a}

79. It appears also to be generally agreed upon that the decision of a Court in favor of the existence of a jurisdictional fact, and therefore of its own jurisdiction, cannot be impeached collaterally; and is conclusive of jurisdiction, except against a direct attack. "Whatever the rule may be, where the record is silent, it would seem clearly and conclusively established by a weight of authority too great for opposition, unless on the ground of local and

³⁶ *Wiley v. Pratt*, 1 Ind. 628.
Shumway v. St.
Reynolds v. Fleming, 46 Am. Rep.
Winters v. Means, 13 Am. St. Rep.
³⁷ *Houston v. Dunn*, 13 Tex. 476.
Hill v. Mc
Sullivan v.
Kerr v. Kerr, 41 N. Y. 372.

³⁸ 34 La. Ann. 520.
³⁹ *Eis v. Smith*, 66 Am. 359.
v. Homest 40.
v. Johnson, 75 Ind. 31.
v. Hayes, 92 U. S. 434.
Monroe v. Aspinwall, 21 How. St. Rep. 114.

peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance or a return of service by the sheriff in the record of a domestic court of general jurisdiction, is absolutely conclusive, and cannot be disproved by extrinsic evidence."⁴⁰ Blackburn, J., further added that "it was argued, that the general rule applied to this case, which is applicable to inferior courts with a limited jurisdiction, *viz.*, that where such court exceeds the limits of its jurisdiction, the proceedings are void, and may be shown to be so in any collateral proceedings. If it were so, and the local courts of bankruptcy were inferior courts, these consequences might follow, however inconvenient they might be." It was said broadly in *Bunbury v. Fuller*⁴¹ and in other cases,⁴² to be "a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case, upon which the limit to its jurisdiction depends," but this proposition is not inconsistent with the conclusiveness against collateral attack of decisions on jurisdictional facts. In *Revelt v. Blake*,⁴³ the majority of the Court of Common Pleas held that, as on the facts which were before the County Court, the adjudication made was correct and one which the Court was bound to make, it was not rendered null by the fact that the Court had come to a wrong conclusion that the bankrupt had not traded in London; Bovill, C.J., saying, "In ordinary cases where the jurisdiction of an inferior tribunal, as of Magistrates at *petty sessions*, depends on some fact it is their duty to enquire as essential to this jurisdiction, the determination of that tribunal after *bond fide* investigation as to such fact, is conclusive as to the existence of such jurisdiction so far as that fact was concerned." On appeal, the Exchequer Chamber unanimously held that "each County Court has a general jurisdiction in Chancery as part of one general court of record, and therefore the adjudication was merely an irregular exercise of jurisdiction, and that the question as to the effect of want of jurisdiction did not really arise." The American courts also generally hold that "whenever the question of jurisdiction is one of fact, and is decided by the court whose proceedings are in question, the decision will be final, whether the question arise on a writ of error or in a collateral action."⁴⁴

⁴⁰ 1 Sm. L. C. 442.

. 394.

⁴¹ L. R. 7 C. P. 309.

⁴² *Reg. v. Bolton*, 1 Ad. El. 66.
Mould v. Williams, 5 Ad. El.

Woodbury v. Maguire, 42 Iowa.
Harris v. McLaughan, 11 Iowa.
v. Drenback, 8. 111
Hodgdon v. Johnson, 7 Ind. 31
Vall v. Owen, 19 Barb. 22.

In *Bloom v. Burdick*,⁴⁶ the Court said, "When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside, or reversed by a direct proceeding." This was cited with approval in *Ex parte Sternes*,⁴⁷ in which Paterson, J., in delivering the judgment of the California Supreme Court said: "This is the record of the court, acting within its legitimate powers, and that record must be considered as speaking the truth, and as conclusive until it has been in some way set aside or vacated. No evidence can be received to contradict it." Mr. Herman even says that "where the judicial tribunal has not general jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially averred and established, and when so established on a hearing of all proper parties cannot be impeached in any collateral proceedings."⁴⁸ In *Wright v. Douglass*,⁴⁹ Mr. Justice Gridley said: "The want of jurisdiction may always be shown by evidence, except in one solitary case, viz., when jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding." The jurisdiction of a court does not depend upon the circumstance of the record disclosing such a state of facts to have been really shown in evidence, as to warrant the exercise of its authority.⁵¹

Clopton, J., in *Goodwin v. Sims*,⁵² after referring to a number of decisions said: "The rule deducible from these decisions is, that when the Court, by the recitals of the decree, ascertains the jurisdictional fact, such adjudication is final and conclusive when the decree is collaterally assailed; and if the decree is silent, the jurisdictional fact may appear from other parts of the record. As the entire record imports absolute verity, the recitals of the decree may be explained, limited, or qualified by other parts of the record. The entire record may be looked to for the purpose of ascertaining the jurisdictional facts, when there is no finding by the Court; for jurisdiction is acquired

⁴⁶ 17 Am. Dec. 220.

⁴⁷ 11 Am. St. Rep. 2-1.

⁴⁸ *Anderson v. Beard*, 38 Tenn. 310, 1 Comm. 417.

⁴⁹ 10 Barb. 111.

⁵⁰ 11 W. Jur. 77.

⁵¹ 11 Am. St. Re.

from the facts as they appear in the entire record; but when the power to ascertain the jurisdictional fact is conferred on the Court, and the Court adjudges that it has jurisdiction, it is not overcome or destroyed because other parts of the record may not be sufficient to uphold such finding.⁵⁵ It must affirmatively appear that such finding cannot be true. . . . It is unnecessary to decide what would be the effect if other parts of the record contradicted or disproved the findings of the Court as recited in the decree, or whether such findings are conclusive when the record itself shows that the evidence of jurisdiction on which the Court acted is insufficient to establish the jurisdictional fact. Evidence outside of the record, whether verbal or written, cannot be received to impugn the recitals of the decree."

The same rule is held to apply in America to the Courts of limited jurisdiction also. Thus the California Supreme Court laid down broadly in *Grove Street*,⁵⁶ that even "an inferior court may determine conclusively its own jurisdiction or power, by adjudicating the existence of facts upon the existence of which its jurisdiction or power depends." However, the New York Supreme Court in *Dyckman v. Mayor*,⁵⁷ said: "On examining the authorities respecting the conclusiveness of records on jurisdictional questions, there will be found great and irreconcilable diversity, and I shall place my opinion on this question in one single proposition, which is supported by several cases, and contradicted by none; and that is, that when the jurisdiction of a Court of limited authority depends on a fact, which must be ascertained by that Court, and such fact appears, and is stated in the record of its proceedings, a party to such proceedings, who had an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterwards, in a collateral action against his adversary in those proceedings, impeach the record, and show the jurisdictional fact therein stated to be untrue." The Supreme Court of Ohio observed in *Anderson v. Commissioners*,⁵⁸ that matters collateral to the merits and precedent to the exercise of jurisdiction by an inferior court are not concluded by the judgment except when the statute required the court to pass upon them. In *People's Savings Bank v. Wilcox*,⁵⁹ the Supreme Court of Rhode Island also said that "the rule applicable to Courts of limi-

⁵⁵ *Bannon v. People*, 1 Brad. App. 406.
61 Cal. 458
5 N. Y.

⁵⁶ 12 Cal. 673.
⁵⁷ 2 Am. St. Rep.

ted jurisdiction which is the better established on principle and authority, is this: that where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be averred of record, and was actually found upon evidence by the Court rendering the judgment. . . . But, on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without partly at least re-trying the case on its merits, which is not permissible in a collateral proceeding."

These distinctions have, however, been sharply criticized and condemned by Mr. Vanfleet who points out that they attempt to draw a distinction between inferior and superior Courts where none exists;⁵⁸ and says "they overlook the point that, in all Courts, the allegations of the petition alone can be examined to determine the jurisdiction over the subject-matter, and that the allegations contained in the proof of service or recital of appearance alone can be examined to determine the jurisdiction over the person; and that the only difference between inferior and superior Courts is one of presumption in regard to jurisdiction; and that when this is shown by the record of an inferior Court, its adjudication is entitled to the same respect, collaterally, as that of a superior Court."⁵⁹ Mr. Black says, "It appears to be undisputed that if the jurisdiction of an inferior Court, in any case, depends upon the existence of a certain fact or state of facts, and it is shown by the record that there was evidence tending to prove such facts, and that such evidence was adjudged sufficient, and the Court judicially determined that such facts existed, then the judgment cannot be collaterally impeached or contradicted."⁶⁰ ⁶¹ And this is the rule as to all the facts required to give jurisdiction in any case. If there is a total defect of evidence of the fact, the summons to the defendant will be void, in whatever form the question may arise, but if there be even a slight proof

⁵⁸ Law. Col. Att. 90, 91.

⁵⁹ *Fide* Boyer v. Schofield, 2 Keyes, 638.

⁶⁰ *Porter v. Purdy*, 30 N. Y.

Holton v. Brewster, 32 Bar

Waterhouse v. Corbins, 40

Angel v. Robbins, 4 R. L.

Shawhan v. Loffer, 24 Iowa, 217.

Hungerford v. Cushing, 8 Wis. 324.

Kipp v. Fullerton, 4 Minn. 473.

People v. Hagar, 32 Cal. 183.

Montgomery v. Wason, 115 Ind. 343.

⁶¹ Ill. Jud. 390

tending to make out a proper case, the summons will be valid against a collateral attack, because in the first case the Court acts without authority, in the other it only errs in judgment upon a question properly before it for adjudication. The same principle applies when the wrong determination of a jurisdictional fact is due not to the misappreciation of evidence but to a mistake of law ; the correct rule applicable to such a case being that "if the question is colorable, such as a person unskilled in the law might mistake, it will shield the decision from collateral assault. . . . if the jurisdictional matters are colorable, the proceeding is not void."⁶²

The correctness of the main rule has also been denied sometimes. Thus Bronson, J., in *People v. Cassels*,⁶⁶ observed that no Court or officer could acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts upon which jurisdiction depends. Paige, J., in *Harrington v. People*,⁶⁷ in *Noyes v. Butler*,⁶⁸ and in *Hard v. Shipman*,⁶⁹ said that the record of any Court, superior or inferior, was never conclusive as to the recital of a jurisdictional fact, and the defendant was always at liberty to show a want of jurisdiction, although the record averred the contrary, because if the Court had no jurisdiction, it had no power to make a record, and the supposed record was not in truth a record. The weight of authority, however, is in favor of the finality of the finding, and the law may be considered settled accordingly.

180. This question has arisen most often in America in regard to a finding by the court as to the conclusive effect of a finding as to service of process ; and it is generally held that when the statement in regard to the service is made by the court, it must be conclusively presumed that the court acted upon sufficient evidence and with due deliberation before making it, and a finding or recital showing that the court had jurisdiction is not disputable when a

^c It has sometimes been held that where jurisdiction exists over a general subject-matter, or class of persons, a mistake in deciding that a particular case falls within such general subject-matter or class, does not make the proceeding void. This distinction is not applicable to such cases, and Mr. Vanfleet points out ⁶⁵ that, "an error in holding jurisdiction over a general subject by a mistaken construction of doubtful law, is no more fatal than an error in holding that a particular case falls within a general subject over which jurisdiction is undoubted." An erroneous finding as to a particular case being of equitable cognizance,⁶⁶ even where the bill shows that there is an adequate remedy at law ⁶⁷ is not void.

⁶² Law. Col. Att. 96.

⁶⁶ *Nelson v. Moline Iron Works*, 9 S. C. R. 781.
⁶⁷ *Goodman v. Winter*, 66 Ala. 410.

⁶⁵ 5 Hill.
⁶⁶ 6 Barb. 607.
⁶⁷ 6 Barb. 613.
⁶⁸ 6 Barb. 621.

judgment based thereon is drawn in question collaterally.⁷⁰ In *Collins v. Ryan*,⁷¹ the order was held not to be void, even though the court had expressed itself satisfied as to the service of the process on too feeble evidence or even without proof of sufficient diligence. The recitals in the decision are, however, to be taken in every case, with the whole record, so that if there is any conflict between the recitals in the decision, as to the terms of an order, and the order itself, the latter must control, for a recital of the order must yield to the order itself.⁷² In *Cloud v. Inhabitants*,⁷³ there was a recital that the defendant had been duly served with process, but when the service was produced it proved to be worthless, and the judgment was held to be void and a nullity. In *Blodgett v. Schaffer*,⁷⁴ it was held that a recital in the judgment as to service of summons would not be conclusive where the service found in the record was fatally defective. The same principle was followed in *Crow v. Meyersieck*,⁷⁵ in which it was said in substance that the notice was a part of the record, that it showed the infirmity on its face, and contradicted the general recital of due notice, and thus a want of notice appeared from the whole record. In *Hobby v. Bunch*,⁷⁶ the summons ought to have been served on the defendant personally, but the return showed that it was served by leaving it at the defendant's residence, and the service was held by the Georgia Supreme Court to be void in spite of a recital of due service in the decision, and Bleckley, C. J., said: "It follows that when the judgment recites service, and there is a return, the recital is always based upon the return, and the two are to be construed together. This recital, therefore, being silent as to the mode of service, and the return showing that the mode was not personal service, but by leaving a copy at the defendant's residence, the conclusion results that the rule was served as the return specifies, and not otherwise. All this appeared and still appears on the face of the record. . . . That the return is a part of the record and must be noticed even by a purchaser, in connection with the judgment reciting service, is well established by respectable authority.⁷⁷ There is nothing contrary to this position in *Hightower v. Williams*,⁷⁸ in which case the recital in the judgment showed due service, whether construed alone or in

⁷⁰ *McCauley v. Patton*, 1 Pac. R. 170.

Dunham v. Willong, 69 Mo. 355.

⁷¹ 33 Barb. 647.

⁷² *Milner v. Shipley*, 84 Mo. 106.

⁷³ 86 Mo. 357.

⁷⁴ 94 Mo.

411.

37 Ill. 73

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connection with the rest of the record. The effort was, not to supplement, explain, and qualify by other parts of the same record, but to overcome the recital by extrinsic testimony. Here, on the contrary, there is no resort to extrinsic evidence, but only an application of the rule that the whole record or judgment roll is to be read together." However, mere failure to find an affidavit in the record will not overthrow the decree with its general recital of service by publication, even when such service could not be ordered without an affidavit as to the non-residence of the defendants.⁷⁹

In *Brickhouse v. Sutton*,⁸⁰ the return of service was in the name of the deputy sheriff in lieu of the sheriff, and therefore not legal evidence of the service, and Merrimon, J., in delivering the judgment of the North Carolina Supreme court, said: "The defective return might have been amended upon proper application, if the facts warranted such action. But the court might have made inquiry and ascertained that service was actually made by the deputy sheriff. Indeed, it appears from the record that it did. It is recited therein, and in effect adjudged, that service of process was made on the defendants. It would be more satisfactory if the recital in the record of the fact of service had been fuller, and made some reference to the evidence of service, but this is not essential. Every intendment is in favor of the action of the court and its sufficiency. The ascertainment and recital of facts in the record by the court imports verity and binding effect, and must be so treated for all proper purposes of the action, until in some proper way the action of the court shall be successfully impeached. Thus in this case it must be taken that the court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with the process against them,—that is, served regularly, effectually."

The rule was enunciated at length in *Treadway v. Eastburn*,⁸¹ in which it was said: "If the recitals in the record show affirmatively that the court was without jurisdiction as to the person or the subject-matter, no such presumption would obtain, because it would contradict the judgment itself, and destroy the rule inhibiting its impeachment in a collateral proceeding. In determining whether such judgment affirmatively shows that there has been the service of citation authorizing it,

⁷⁹ 100 N. C. 107, 108. *Am. St. Rep.* 497.

the entire decree must be looked to and considered; and if that portion of it relating to the question discloses that there was no service, or service so defective that a judgment by default thereon would be void and not voidable, and the remainder of the record is silent, and there appears no finding of the court from which it may be inferred that there was either service or an appearance, then the absence of jurisdiction would affirmatively appear. . . . If, however, other parts of the record, and particularly the judgment, which is the final act of the court, entered upon full consideration of all the facts before it, should, as in the present case, show the due service of process or other facts which would give the court jurisdiction of the person, then it would affirmatively appear that such jurisdiction attached, and the rule would apply that in a collateral proceeding the recitals import absolute verity, and cannot be contradicted." This was quoted with approval and followed in *Heck v. Martin*,⁸² in which Hobby, J., said: "We do not think that it was competent in this collateral proceeding for the appellee to impeach or contradict the recitals in the judgment referred to. The Court erred, we think, in permitting this to be done by the admission of the evidence to which the appellants objected."

Speaking of the effect to be given to the determination or decision of a Court as to the service of processes on the defendants, Gholson, J., in *Callen v. Ellison*,⁸³ said: "Is it obligatory, unless impeached or set aside in the mode presented as to other decisions of the Court, or may it be disregarded as null and void whenever brought in question upon allegation and proof that the party in truth had no notice or opportunity to be heard? Hence arises a conflict between principles of policy, which require the former conclusion, and principles of natural justice, which lead to the latter; and, as might be expected in cases of such conflict, the decisions of courts have differed. As to the judgments of courts of general jurisdiction, the decisions in this State (Ohio), though perhaps not entirely uniform or consistent, do undoubtedly show a strong inclination to sustain such judgments against indirect or collateral attacks on their validity and effect. It appears to have been thought that natural justice is satisfied when notice is required, and an impartial tribunal established to ascertain and determine whether it has been given. Nor can it properly be said that such a tribunal has jurisdiction, because it has so decided. Its decision is binding because it was authorized to make it, and

because public policy, and the respect due to the sovereignty it represents, at least in tribunals acting under the same sovereignty, require that the decision should be regarded, while it remains on the record unimpeached and unreversed." In *Coit v. Haven*,⁸⁴ the Connecticut Supreme Court said: "It will not be denied, and has not been on the argument, that when a court has jurisdiction its record speaks absolute verity, because it is the record of the court's doings; and being a court of final jurisdiction there must be an end to the matter in dispute, if it be possible to reach that end at all. And it is so necessary that confidence should be reposed in courts of a high character, as well as in the records of such courts, that on the whole, and in view of all the considerations affecting the subject, it is the only safe rule to give the decisions of courts of general jurisdiction full effect so long as they remain in force, rather than to leave them open to be attacked in every way and on all occasions. Being domestic judgments, they can, if erroneous, be reviewed by proceedings instituted directly for the purpose, and reversed on error, or by a new trial; and if the danger is imminent and special, relief can be temporarily, if not finally, obtained by application to a Court of Equity. Any other rule with regard to judgments of such courts would be attended in its application with very great embarrassment and would be very dangerous in its general operation."

The contrary has been held in some cases. Thus in *Pendleton v. Weed*,⁸⁵ Comstock, J., said: "I think it is always the right of a party against whom a record is set up to show that no jurisdiction of his person was acquired, and consequently that there was no right or authority to make up the record against him." In *Bolton v. Jacks*,⁸⁶ Jones, J., said "It is now conceded, at least in this State, that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and the party against whom a judgment is offered is not, by the bare fact of such recitals, estopped from showing by affirmative proof, that they were untrue, and thus rendering the judgment void for want of jurisdiction." Mr. Freeman says⁸⁷ "The principles which it is thought are sufficient to support the practice of leaving the question of jurisdiction over the parties always open to dispute on collateral proceedings are, that the

high and uncontrollable verity of the record never attaches until the court has obtained jurisdiction of the person of the defendant, as well as of the subject-matter of the action; that in the absence of the fact of jurisdiction over the parties, there is no power competent to make a record; that the thing offered as a record may be nothing but an unauthorized paper; that the law contemplates, upon reasons of natural justice, that no man shall be deprived of any of his rights of person or property without an opportunity of being heard; that whenever the judgment of any tribunal is about to be used in any proceeding, whether direct or collateral, it is incumbent on the court wherein it is offered to inquire into the jurisdiction of the court rendering the judgment; and that no court can bring a party within its power by virtue of false findings and recitals.³³ " But he himself adds in another place, " That the matters intended by a court of record for its memorials may be proved not to be a record by parol evidence is in conflict with the principle recognized from the earliest times of our common law that the plea of *nul tiel record* was to be decided only by inspection of the alleged matter of record. . . . The court has ample authority to make a record; and it is not true that this authority is dependent upon jurisdiction over the party against whom the record speaks. Neither is it true that maintaining the verity of the record in collateral proceedings is more repugnant to natural justice than the opposite course would be. A party who has been wronged by being judged without any opportunity to make his defence may avoid the jurisdiction in various ways. " He cannot generally affect the rights of innocent third parties growing out of a judgment regular on its face. But as to those parties, it would be as great a violation of the principles of natural justice to deprive them of property acquired for a valuable consideration, by establishing some hidden infirmity preceding the judgment, as it is to deprive the defendant of his rights by maintaining the integrity of the record. And as the law cannot minister abstract justice to all the parties, it is at liberty to pursue such a course as will best subserve public policy. This course requires that there should be confidence in judicial tribunals, and that titles resting upon the proceedings of these tribunals should be respected and protected. . . . The hardship arising from an erroneous or inadvertent decision

³³ *Goads v. Hall*, 30 Ill. 109.
11 How. 437.

Gwin v. McCarroll, 1 Smedes & M. 351.
Johnson v. Wright, 27

upon jurisdictional questions is no greater than that issuing from an erroneous or inadvertent decision upon other matters. That the reversal of a judgment in an appellate court shall not affect rights acquired under it by third parties, is a rule universally and uncomplainingly acknowledged."⁸⁹

In *Azman v. Dueker*,⁹⁰ a wrong finding as to a writ of attachment was held not to be void. In *Sheldon v. Wright*,⁹¹ it was, no doubt, held that where a defective service was adjudged to be good, the defendant's right to defeat the judgment collaterally was just the same, whether he did not appear or whether he did appear specially and contest the point unsuccessfully; but Mr. Vanfleet aptly points out that that case seems to confuse jurisdiction over the person with jurisdiction over the subject-matter, and says, "Where the want of jurisdiction over the subject-matter is clear beyond all debate, the denial of a motion to dismiss cannot make the judgment valid. It is not so, however, with a want of jurisdiction over the person. It is possible for the court to obtain that. And when the defendant appears specially and moves to dismiss for want of service, the court has power to decide that motion. In respect to the motion, it has jurisdiction over both person and subject-matter, and its judgment that the motion is not well taken, however erroneous, is not void, and cannot be attacked collaterally, and necessarily shields the judgment in the main case, even though it may show an entire absence of service."

181. The competency of a court's jurisdiction over a suit is not affected, however, by the conditions or mode of its exercise, by the legal character or position of the suit, or the procedure prescribed for its cognizance or disposal,—nor by the absolute or provisional bar of the suit or the inappropriateness of the issues tried or the relief awarded. Certain preliminary conditions are prescribed in some cases for the institution of suits, having reference usually to the production of a certain certificate, to the giving of certain notices, to the lapse or non-lapse of a certain period, or to the nature of the relief that can be decreed. Thus Act XI of 1859 for sales of land for arrears of revenue, provides that no suit to annul a sale made under that Act shall be received by any court of justice, unless it shall be instituted within one year from the

It has never been held, however, that the mere fact of the institution or cognizance of a suit in violation of such provisions prevents the judgment passed in it from operating as *res judicata*, or even avoids it collaterally. Such provisions are not essentially different in their character from those enacted for barring suits before the accrual of the cause of action or after the lapse of the period of limitation provided for them, and though it used to be held sometimes that the Court in taking cognizance even of such suits acted without jurisdiction, yet it has long been quite settled that it is not so, and that the bar of a suit by Limitation Law does not affect the jurisdiction of the court, and even the validity of a judgment passed therein at least against collateral attack. In the United States it has been held recently in *Head v.*

⁹⁹ Sec. 39, Madras Act II of 1864.
Sec. 31, Madras Act VI of 1867.

⁹¹ Sec. 11, Act X of 1876.

⁹⁸ *Babaji v. Rajaram*, L. L. R. I Bom. 79.
Jijaji Pratapji v. Balkrishna, L. L. R. XVII
Bom. 100.

⁹⁶ *Mahammad Azmat Ali Khan v. Lalli Begum*
L. R. IX I. A. 20.
Jijaji Pratapji v. Balkrishna, L. L. R. XVII
Bom. 100.

Daniels,⁹⁷ that a judgment for a debt barred by Limitation Law is not void. In some of the States a decree for a claim prematurely brought is held to be void.⁹⁸ The weight of authority is, however, in favour of the opposite view. The Indiana Supreme Court has steadily ruled that a judgment taken either adversely⁹⁹ or by way of confession,¹⁰⁰ on a claim before it was due is not void. The same has been held in Texas¹ and New Jersey.² In fact, it appears to be agreed upon as a general rule that a judgment is never void, because the cause of action is void.³ This was held in several cases when the cause of action was a void contract⁴ or a void judgment.⁵ Even the grant of a probate on a will void for attestation has been held not to be void.⁶

A contrary view has been taken in the United States as to certain conditions of jurisdiction. Thus in *Bassick Mining Co. v. Schoolfield*,⁷ it was held that to confer actual jurisdiction in a particular case, the jurisdictional power of the Court must be invoked by such proceedings as are requisite in accordance with the law of the particular tribunal. In *Ferguson v. Jones*,⁸ a decree was held to be void, for having been given without the consent required by statute, Lord J., observing that "when jurisdiction has attached, all that follows is but the exercise of jurisdiction, but jurisdiction does not attach until the conditions upon which it depends are fulfilled."

182. It is also a general rule, that a Court has no power to give judgment respecting a matter not submitted to it for decision, even in a suit involving other matters which have been so submitted, and over which it has jurisdiction.⁹ In *Robinson v. Duleep Singh*,¹⁰ Lord Justice James observed that "if the court had gone beyond the rights which were properly in issue between the parties, the decree of the court would be absolutely null and void." In the United States it was held in *Munday v. Vail*¹¹ that for the exercise

⁹⁷ 15 Pac. R., 911.

⁹⁸ *Davis v. Eppinger*, 79 Am.

Sp. or c. Corll, 33 Ohio, 230.

White v. Jones, 35 Ill., 159.

Connelly v. Woods, 31 Kan., 369.

⁹⁹ *Gail v. Fryberger*, 75 Ind., 98.

De Haven v. Covert, 63 Ind., 344.

Robertson v. Hoffman, 92 Ind., 247.

v. Byrum, 95 Ind., 421.

¹ *McNeill v. Hahnmark*, 26 Tex., 157.

v. Blum, 63 Tex., 44.

Sanders, 36 N. J. Eq.

Law, Col. Att.

⁴ *Murray v. Weigle*, 11 Atl. R., 781.

Wood v. Blythe, 1 N. W. R., 341.

State v. Ranney, 71 Mo., 229.

⁵ *Ferguson v. Millender*, 11 H. R., 38.

Prince v. Antle, 13 H. W. R., 430.

Martin v. Tully, 72 Ala., 23.

Moore v. Martin, 35 Cal., 428.

⁶ *Leatherwood v. Sullivan*, 18 R., 718.

Wells v. Stearns, 33 Hun., 323.

⁷ 10 Cal., 46.

⁸ 20 Pac. R., 842.

v. Stockton, 3 Am. St.

v. Blackstock, 6 Am. St.

11 Ch. D., 799.

34 N. J. Law, 412.

of jurisdiction by a Court in any case, the point decided must be, in substance and effect, within the issue, and therefore cognizable by the Court in the suit. As to a defect in a judgment arising from the fact that the matter decided was not embraced within the issue, the New Jersey Supreme Court in that case said: "Upon general principles, such a defect must avoid a judgment. It is impossible to concede, that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels." This decision was followed in *Reynolds v. Stockton*,¹ in the same State, Van Syckel, J., having further said: "A judgment or decree which is not appropriate to any part of the matter in controversy before the Court cannot have any force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby. . . . The decree in New York having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own Courts

under like conditions. Under the authority of *Munday v. Vail*, it must be treated as a nullity;" and this decision has been upheld on appeal by the United States Supreme Court.¹³ In that same State, it has been held again in *Jones v. Davenport*,¹⁴ that a decree on matters outside the issues raised by the pleadings, is a nullity collaterally. In Indiana, also, it has been held in several cases, that a judgment decreeing that one defendant is surety for another, when the pleadings disclosed no issue about it, is void. In *Falls v. Wright*,¹⁵ the land in controversy was not described or included in the widow's petition for dower; there was no issue as to whether she was entitled to dower in it; and the Arkansas Supreme Court held that "the judgment of the Probate Court assigning it to her as dower was aside from the issue which the proceedings presented, and was therefore void."

It has sometimes even been held that a judgment without an issue to be determined by it is a nullity,¹⁶ "because until an issue is formed, there is no question before the Court for decision, no subject-matter upon which it can act." If this view were tenable, however, the power of the judiciary could and would be entirely evaded by defendant's neglecting to interpose any defence, for it is only by such interposition that an issue can be formed. Nor does it appear to have ever been directly decided that the invalidity or even the nullity of the judgment in these cases is due to the want of competency of jurisdiction in the court, and not simply because the judgment in these cases is outside the issues and therefore not allowed by law. Besides it is to be borne in mind in considering the weight of the American decisions in regard to the invalidity of judgments that, as will be explained at greater length in Sec. 186, the American Courts take a very broad view of the absence of jurisdiction on account of the requirement of due process of law introduced into the constitution by the fourteenth amendment thereof.

183. The same remarks are applicable to the rule recognized by some American courts and enunciated by some American text-writers in regard to courts having jurisdiction to decree only the relief that may be decreed legally in the circumstances. Mr.

¹³ 140 U. S. 254.

¹⁴ 17 Atl. R. 570.

St. Rep. 74.

¹⁵ *Steele v. Palmer*, 41 Mass.
Armstrong v. Barton, 42
Porterfield v. Butler, 11

Freeman says: "The statement that jurisdiction is the power to hear and determine is liable to produce the impression that where it exists, any determination which the court may make is valid, though in excess of its powers and liable to be set aside by appeal or by some other correctory proceeding. The determination of an action is not confined to the decision of issues of law and fact and ordering judgment for one party and against another, but embraces the relief granted; and that there should be power to grant the relief specified in the judgment is as essential as that there should be power to entertain the action and dispose of the issues of law and fact therein. It is true that there is great difficulty in formulating any test by which to determine whether a judgment granting relief other or in excess of that authorized by law may be disregarded as void, or must be treated as valid until vacated by appeal or otherwise; but that it is possible for a Court having jurisdiction both of the subject-matter and of the parties to an action to pronounce a judgment so far in excess of its powers as to be wholly or partly void, we think must be conceded."¹⁷ Similarly, in *Windsor v. McVeigh*,¹⁸ Mr. Justice Field observed that "if the action be upon a money demand, the court has no power to sentence the party to imprisonment; if it be for a personal tort, the court cannot order the specific performance of a contract; if it be for the possession of real property, the court is powerless to admit in the case the probate of a will." No one is likely to controvert this, but as pointed out by Mr. Vantleet, it is not safe to draw principles from imaginary cases which never have occurred, and doubtless never will occur.

In *Corwith v. Griffin*,¹⁹ commissioners in partition in their distribution embraced lands other than those contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, as the jurisdiction was confined to the subject-matter set forth and described in the petition. The same view was taken in *Seamster v. Blackstock*,²⁰ in which Richardson, J., in delivering the judgment of Virginia Supreme Court said: "Where a bill is filed to sell a certain lot, and a decree is entered for the sale of another and different lot, not named in the bill, and to which the bill has no relation, such decree, as respects the last-mentioned lot, is a nullity." The same appears to have been held in *Knopf v. Morell*.²¹

¹⁷ Fr. Jud. 180
¹⁸ 93 U. S. 282
¹⁹ 31 Barb 9

²⁰ 4 Am. St. Rep. 262.
²¹ 13 N. E. R. 51.

In *Fithian v. Monks*,²² a judgment was held to be void, on the ground that in addition to having jurisdiction over the subject-matter and of the person, the court must be authorized to give the kind of relief which its judgment assumes to grant. Similarly where a creditor brought a suit, alleging that he had lent on a promise that the defendant would hypothecate certain land as security therefor, and that the borrower had conveyed such land, in trust, for himself and his wife for life, with remainder to his children, and asked that the trust be declared void with respect to his claim, and the court proceeding beyond the prayer of the bill, annulled the deed as between the trustee and the *cestuis que trust*, it was held that part of the decree was void.²³ On the same principle, where a widow sued to have her dower assigned to her, and the Court after assigning it, of its own accord directed the sale of the residue of the land for division among minor heirs, the decree of sale was adjudged to be void.

Speaking of the cases in which the action is to recover a sum of money, or the possession of real or personal property, and the court gives judgment for a sum in excess of that prayed for in the complaint or shown to be owing by its allegations, or for the possession of property different from or in excess of that described in the complaint, Mr. Freeman says²⁴: "As to such excess, there has been no pleading or process seeking to recover it or notifying the defendant that it was claimed of him. Nevertheless, it has been assumed, rather than decided, that a judgment larger than the complaint justified, or for more than specified in the writ cannot be avoided collaterally."²⁵ In some States a personal judgment rendered against a garnishee, where only an order to deliver is authorized, has indeed been held to be void.²⁶ The weight of authority is, however, against that view. It appears to be generally established that in a suit for movable property, a judgment only for its delivery or for its value will not be void.²⁷ In *Rector v. Drury*,²⁸ the Court, instead of ordering the delivery of certain corn, gave a judgment for its value, and the judgment was held not to be void; and Mr. Vanfleet justifies the decision on the ground that, "if the Court had granted

²² 43 Mo. 502.

²³ *Munday v. Vall*, 34 N. J. Law. 418.

²⁴ *Pr. Jud.* 190.

²⁵ *Gillit v. Truax*, 37 Minn. 520.
v. Hooper, 54 Vt. 512.

Giles v. Hicks, 45 Ark. 271.

²⁷ *Wright v. Card*, 19 Atl. B. 709.

Marix v. Franko, 9 Kan. 152.

Promlet v. Poor, 50 N. H. B. 100.

²⁸ 3

relief which was beyond its power in any case whatever, it would have been void; but as it had power to render a personal judgment for that amount in a proper case, doing so in an improper case was simply the wrongful exercise of power.”²⁹ In a later case, the same Court again took a similar view.³⁰ In Massachusetts, a plaintiff can, in certain cases, recover costs only if he recover more than ten dollars, but an order awarding costs when the recovery was for ten dollars only was held in *White v. Morse*³¹ not to be void; and the Supreme Court said: “In rendering a judgment for costs, the defendant was not acting outside or in excess of his jurisdiction; his error was an error of judgment in deciding a question of law which he was obliged to decide, and which was within the scope and limits of his jurisdiction.” Mr. Vanfleet says, “Where the tribunal has power to grant relief of a particular kind, an error in giving too much or not enough, is never void, so long as it does not exceed its possible power in any cause of the general class to which the one under consideration belongs. Thus excessive damages, or excessive equitable or legal relief given in a particular civil cause, the court having power to give such damages or relief in a proper civil cause—do not make the judgment void.” . . . All the cases agree, that a judgment within the general scope of the allegations is not void because not warranted by the prayer When the matter in controversy is referred to appraisers, commissioners, referees, or other similar officers to take evidence and report, the report becomes a paper in the cause, and is a part of the record, and if it is broader in its scope, or includes property or matters not mentioned in the pleadings, a judgment or decree in accordance therewith ought not to be held void.³² In *Fletcher v. Holmes*,³³ there was no prayer for a personal judgment against the defendant, but it was rendered against him on his consenting to it, and it was held valid, the Court having said: “We can conceive of no reason why a judgment entered by agreement, by a Court of general jurisdiction, having power in a proper case to render such judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstand-

²⁹ Law. Col. Att. 781.

³⁰ *Rasmussen v. McCabe*, 43 Wis. 471.

³¹ 180 Mass. 102.

³² Law. Col. Att. 780, 801.

³³ 25 Ind. 458.

ing the pleadings would not, in a contested case, authorize such a judgment. The object of a complaint is to inform the defendant of the nature of the plaintiff's case. . . . If he wishes to waive it, or agrees to the granting of greater relief than could otherwise be given under its averments, without amendment, and such relief is given by his consent, we think that the judgment is not even erroneous, much less void as to him."

In a late case in Texas, the plaintiff had sued to recover the half of a league of land, and the matter had been submitted to arbitrators who awarded him the whole league, for which a judgment was rendered. This judgment being assailed collaterally, the court said: "A decree within the jurisdiction of the court, its terms alone will determine its extent; and, it will not, in a collateral attack, be restricted by the pleadings. A judgment erroneous for want of issues by the pleadings will be corrected on error or appeal, but it is not void."³⁴ The Missouri Supreme Court said in *Lewis v. Morrow*,³⁵ that a judgment would not be void, "because the pleadings did not warrant the judgment;" and in *O'Reilly v. Nicholson*,³⁶ that "a judgment, though informal, even to the extent of granting a relief not contemplated in the petition, when the parties are before the Court and the relief is within its jurisdiction, is not a void proceeding." In *Allie v. Schmitz*,³⁷ a bill in equity for partition against husband and wife alleged that the wife owned the undivided one-third; and without any cross-bill between the defendants, a decree was rendered that the husband and wife owned the undivided one-third, and it was set off to them. Afterwards in a suit for it by the wife alone, it was held that the decree in the husband's favour could not be attacked by her collaterally.

184. In some cases, even certain ordinary provisions relating to the institution or cognizance of suits are deemed conditions attached to the exercise of jurisdiction, and a non-compliance therewith held to constitute a defect of jurisdiction. It has thus been held that a court has no jurisdiction to

Improper institution of proceedings does not affect competency of court's jurisdiction.

³⁴ W. L. Wilson v. Wright, Tex. Unreported case, 71 L. Law. Coll. Ab. 503 (1901).
³⁵ 18 W. 2d 23

³⁶ 45 Mo.
³⁷ 17 W. 160.

and decide a suit or an appeal within its jurisdiction and cognizable by it, if it is *instituted* in a court not having such jurisdiction,¹⁰ even though it may be transferred to it by higher judicial authority. The Calcutta High Court held in *Peary Lall v. Komal Kishore*,¹¹ that it could "direct the transfer of an appeal only from a court having jurisdiction to receive and try it," and that decision was approved of by their Lordships of the Privy Council in *Ledgard v. Bull*.¹² These views were expressed however on appeal, and the decision of a court having jurisdiction does not appear to have been ever held void, simply because the suit in which it was passed was not instituted in it but was transferred to it from a court in which it was instituted and which had no jurisdiction over it.

Further, it appears to be generally agreed upon that as the preferring of a plaint or petition is the usual and regular mode of bringing a controversy to the cognizance of a Court, it will be incorrect to make the jurisdiction depend upon the technicality or sufficiency in law of the case so presented,¹³ and that if such a case is stated that on a demurrer the Court may render judgment in the petitioner's favor, it is an undoubted case of jurisdiction.¹⁴ In *Taylor v. Coots*,¹⁵ objections were made against the judgment of foreclosure and sale on the ground that the petition had not stated facts sufficient to constitute a cause of action, but Maxwell, J., in delivering the judgment of the Nebraska Supreme Court said, "The sufficiency of the petition is not a test of jurisdiction. This Court so held in *Trumble v. Williams*.¹⁶ The court may commit an error in sustaining an insufficient petition. That, however, does not affect the validity of the judgment, if no direct proceeding is had to vacate or set it aside, provided the court had jurisdiction."

It has been said that "if the petition sets forth facts sufficient to challenge the attention of the Court, with regard to its merits, or to authorize the Court to deliberate with respect thereto," it will be sufficient to confer jurisdiction on the court.¹⁷ The Illinois Supreme Court said, "Enough must appear, either in the application or the order, or at least somewhere on the face of the proceeding, to call upon the court to proceed to act; and all agree that

v. Awasthi v. Jish
R., IV All. 478.
61 L. R. VI Cal. 30.
62 L. R. XIII L. A. 134.
63 Bl. Jud. 200.

L. I. L.

64 United States v. Arredondo, 6 Pet.
65 20 Am. St. Rep. 426.
66 19 Neb. 144.
67 Hend v. Daniels, 15 Pac. R. 914.

when that does appear, then the court has properly acquired jurisdiction.⁴⁸” Mr. Vanfleet taking a still broader view, says: “I conclude that allegations immaterial and wholly insufficient in law may be sufficient ‘to set the judicial mind in motion,’ and to give a wrongful but actual jurisdiction which will shield the proceedings from collateral attack. It seems to me that the Indiana case (*Ricketts v. Spraker*⁴⁹) which was a special statutory proceeding before a board of inferior and very limited judicial power—announces the true and only logical rule, namely, that if there is any petition at all invoking the action of the court, its judgment is not void. The Courts of New York are not able to stand by their early rule that, where a single material allegation is omitted from a petition in a special proceeding, it is void.⁵⁰ The failure to allege any matter necessary to make a cause of action, or the allegation of matters which do not do so, when the object of the pleader is apparent and the relief sought is within the power of the Court to grant, can never make the judgment void.⁵¹ An examination of the cases will show that each allegation required, either by the Common law or the statutes, in proceedings either special or general, has been held immaterial, collaterally, and that its omission did not make the proceeding void. Thus they have all been eliminated. If the omission of one material allegation from the complaint, affidavit or petition, does not make the proceeding void, it is difficult to see why the omission of more than one, or all of them, should do so. Where the material allegations show affirmatively that no cause of action exists, they can all be struck out without injury, thus letting the cause stand on the immaterial allegations; and if a judgment rendered with such material allegations in the complaint is not void, as the cases show, one rendered in their absence cannot be void for that reason, as they add nothing to the pleading.”⁵²

The contrary has often been contended, and sometimes even held, as to the affidavit generally required to be endorsed on or filed with the plaint or the petition of appeal. In *Palmer v. Peterson*,⁵³ the appeal was required to be presented with an affidavit by the appellant or some person

⁴⁸ *Young v. Lorain*, 52 Am. Dec. 463.
Phigghbon v. Lake, 81 Am. Dec. 3.
 Vide also, *Malford v. Stalzenbach*, 46 Ill. 303.
⁴⁹ 77 Ind.

⁵⁰ *Hallcock v. Denny*, 69 N. Y.
⁵¹ Law, Col. Att. 63.
⁵² Law, Col. Att. 79.
⁵³ 1 N. W. R. 73.

authorized by him, as to its being made in good faith, and it was filed by an unauthorized person, and it was held that even a subsequent ratification of it by the appellant himself would not give jurisdiction to the court over the subject-matter. But Mr. Vanfleet disapproves of the decision, and says: "The power to pass upon the right involved in the controversy was the jurisdiction over the subject-matter, and that was undisputed. The power over the person of the appellant was the question in controversy, and he could waive that by appearing or consenting."⁵⁴ It appears really that the question was not of jurisdiction at all, but simply of procedure, and therefore quite irrelevant so far as jurisdiction was concerned. In *Johnson v. Jones*,⁵⁵ the Supreme Court of Nebraska said, "The affidavit to the petition was not an element of jurisdiction without which the court could not act. It was, at most, merely a formal part of the petition—a preliminary form in commencing suit, and its omission amounts to one of those irregularities which cannot be collaterally called in question, even if the proceedings had taken place before an inferior tribunal." This has been approved in *Trumble v. Williams*.⁵⁶ The same has been held in other States also,⁵⁷ nor will an order be void simply because the affidavit required does not show who the affiant was,⁵⁸ or the jurat had been omitted to be recorded by inadvertence.⁵⁹ It has also often been held, that even in cases in which a plaint is required by positive law to be verified by the plaintiff, as is the case in British India, the absence of the verification does not affect jurisdiction;⁶⁰ and as observed by Mr. Vanfleet "if its entire absence does not affect the jurisdiction, of course mere defects in it cannot."

185. Mr. Hawes in his Work on the jurisdiction of courts says that when the original court has no jurisdiction over a suit, an appeal will not confer it upon the Appellate court, so when the jurisdiction of a court over a particular subject-matter is appellate only, the Appellate court's jurisdiction not affected.

⁵⁴ Law Col. Att. 424

⁵⁵ 2 Neb. 138

⁵⁶ 34 N. W. R. 716

⁵⁷ *Sprague v. Taylor*, 45 Ala. 320.

Myers v. Davis, 47 Iowa, 325.

Overton v. Crawford, 75 Am. Dec. 244

Waters v. Bates, 44 Pa. St. 473.

48, 46 Tex.

⁵⁸ *Shelton v. Wright*, 5 N. Y. 497

Kaiser v. Wilson, 70 Ill. 233.

⁵⁹ *Eastman v. Rolfe*, 30 Mo. 38

v. Wattles, 49 N. W. R. of Att. 235

only manner in which the authority to adjudicate upon that particular matter can be obtained is by an appeal to it in a regular manner.⁶¹ This view was adopted in a number of Indian cases, but it appears to be now settled that where a Subordinate Court has no jurisdiction over the trial of a suit or an appeal, the Appellate Court authorized to hear appeals from that Subordinate Court has power as such to set aside its proceedings on an appeal. In *Jwala Prasad v. Salig Ram*,⁶² Straight, J., (with the concurrence of Sir John Edge, C.J.,) said: "A preliminary objection was taken to the hearing of the appeal on the ground that as no appeal lay to the District Judge, *a fortiori* no appeal lay to this Court. That proposition had authority in cases to be found in I. L. R. IV. All. 237,⁶³ and 1887 All. W. N. 76,⁶⁴ to both of which I was a party, and there are other rulings of mine to a like effect. I have for sometime past, after consultation with the rest of the Court, come to the conclusion that those rulings were erroneous."

186. It has sometimes been contended with regard to certain other provisions of the law No other provisions relating to procedure affect jurisdiction. of procedure also, that they constitute a condition of the valid exercise of jurisdiction, and that a departure from them is an excess of jurisdiction. Thus in *Deokishen v. Bansi*,⁶⁵ Mr. Justice Straight said "The jurisdiction of a Judge to pass an order of remand under Sec. 562 was limited by the terms of that section; and that being so, the jurisdiction of this Court was similarly limited in dealing with an appeal from his order preferred under Sec. 588. Under these circumstances the remark made in the order of this Court, dealing with the plaintiff's right of pre-emption, can only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right." The expressions denoting absence of jurisdiction are often used in a loose sense so as to denote also the inability arising from the provisions of law relating to procedure, the inability arising from the circumstance that the court should not act in a certain manner. Mr. Justice Field in *Windsor v. McVeigh*⁶⁶ referred to several instances which in his opinion involved such a departure

⁶¹ Haw. Jur. 9.

⁶² I. L. R. XIII All. 575.

⁶³ *Kishna Ram v. Hingra* 1 a.

⁶⁴ *Tota Ram* 7

⁶⁵ I. L. R. VIII All.

⁶⁶ 10 U. S. 251.

from the established modes of procedure as to render a judgment void. With regard to the particular question involved in that case, he said: "It was not within the power of the jurisdiction of the District Court to proceed with the case so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation thus denied. For jurisdiction is the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore could be no exercise of jurisdiction. By the act of the Court, the respondent was excluded from its jurisdiction." Justices Miller, Bradley and Hunt however dissented from that view.

Refusal to hear a defence even on the ground that the defendant is an alien or a rebel has, however, been held in several other cases also to invalidate the proceedings.⁶⁷ In *Dean v. Nelson*,⁶⁸ certain foreclosure proceedings taken in the State of Tennessee where the defendants had their home were held void, even though notice to appear had been published in accordance with the laws of that state, the United States Supreme Court observing that—"the defendants were within the Confederate lines at the time, and it was unlawful for them to cross those lines. . . . A notice directed to them and published in a newspaper was a mere idle form." In *Earle v. McVeigh*⁶⁹ also, certain judgments were held void on the same principle. In *Dorr v. Rohr*,⁷⁰ the Virginia Supreme Court held that all the proceedings founded upon a notice by publication to a person in an enemy state during active war would be void. Lewis P. in delivering the judgment of the Court said: "All communication between the inhabitants of the confederate states on the one hand, and of those states adhering to the union on the other, was prohibited by law. Hence the execution of the order of publication was without any legal effect whatever. It did not constitute notice, either actual or constructive. The non-resident defendant, had he seen the order as published, could not have lawfully obeyed it, even if he had had the physical power to have done so; and consequently all proceedings founded upon it are void. This is well settled,

⁶⁷ *Underwood v. McVeigh*, 23 Gratt. 409.
⁶⁸ 10 Wall. 160.

⁶⁹ 91 U. S. 508.
⁷⁰ 3 Am. St. Rep. 100.

both on principle and authority. . . . Notice and an opportunity to be heard are essential requisites to the jurisdiction of all courts."⁷¹ In the case last cited, Mr. Justice Field said: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has his day in Court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination."

The Courts in the United States, as observed above, generally take a broader view of the want of jurisdiction on account of the provision in the fourteenth amendment, that "no State shall deprive any person of life, liberty or property without due process of law," "the essence of which," as Mr. Reno says, "is adequate notice of suit to the defendant. Notice of suit is required in order to afford the defendant an opportunity to be heard in his own defence, and it is absolutely essential to due process of law."⁷² In *Stuart v. Palmer*,⁷³ the New York Court of Appeals said that due process of law "Requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." In *Pennoyer v. Neff*,⁷⁴ a personal judgment against a non-resident upon service by publication, in accordance with an express provision of a statute was held to be void, on the ground of the statute being unconstitutional as denying due process of law to the defendant. Mr. Vanfleet observes however that—"if service could be dispensed with in certain proceedings, and errors and irregularities therein disregarded in others, without rendering the proceedings void, collaterally, before this guaranty was placed in the constitution of the nation, the same things can still be done with the same effect."⁷⁵ Mr. Black also observes that if the defendant is not allowed a proper opportunity for defence, "it seems to be rather an irregularity or failure of justice, than a fatal defect in its

77 Va.

Law. Nov. Rev. 203.

71 N. Y. 191
95 U. S. 714.
Law. Col. Att.

jurisdiction.”⁷⁶ Distinguishing a defect of jurisdiction from a mere error or irregularity of procedure which never voids a judgment or order, Mr. Hawes says: “In the former case the whole proceeding is *coram non judice* and void; in the latter the proceeding cannot be impugned in a collateral action, even though it be erroneous upon its face, and even though it relate to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction. It is examinable only on a direct proceeding, as by an appeal or a proceeding in the nature of an appeal, and where there is no remedy of that kind it concludes for ever.”

187. Even in the United States, however, it is held that mere irregularity or defect in a process or its service will not render the subsequent proceedings void. Mr. Vanfleet says that the true rule deduced from all the cases is—“That if information be given sufficient to warn defendant that a judicial proceeding is pending against him in a particular court, and the proof of service is sufficient for the court to infer that he has such information, the proceeding by default will not be void. . . . The proceedings are colourable, and will withstand a collateral assault. A Vermont Statute required a justice of the peace to indorse upon summonses the day, month and year when the writ was presented to and signed by him, and declared that the failure to do so should make the writ void. It was held that a failure to do so did not make the judgment void in trespass for good seized. The Court said: ‘The general principle certainly is, that a judgment can be considered void in no case except where it appears from the judgment itself that the court had no jurisdiction.’”⁷⁷ This old and sensible case ought to settle the law, that the omission of any matter of form, even in direct violation of the statute, does not make the writ void.”⁷⁸ A mere defect in the notice to be given to the defendant is not such an irregularity as to render the judgment of a court having jurisdiction void, even though it may be a sufficient cause for reversal in a Court of appeal.⁷⁹ In *Quarl v. Abbett*,⁸⁰ the Supreme Court of Indiana said:

⁷⁶ Bl. Jnd. 261.

⁷⁷ *Allen v. Huntington*, 16 Am. Dec. 714.

⁷⁸ *Law Coll. Att.* 296.

⁷⁹ *Carlton v. Washington*, Ind. Co. 35 N. H.

⁸⁰ *Ex parte*, in *Bruce v. Cloutman*, 81 Am. Dec. 111.

⁸¹ 1 N. E. R. 476.

“Where there is some notice, although defective, the judgment is not void; if there is notice, although irregular and defective, there is jurisdiction.”

The entire omission of the defendant's name from the process has been held to make the proceedings void,⁸¹ and similarly if the name is wrongly given, and the error is such that it must mislead, the proceedings will be void,⁸² especially when the process is served by publication as in such a case the chance of misleading is much greater.⁸³ In *Vogel v. Brown Township*,⁸⁴ Elliott, J., in delivering the judgment of the Indiana Supreme Court, said: “The general rule is, that if the writ is served on the party by a wrong name, and he fails to appear and plead the misnomer, he is concluded, and in all future proceedings may be connected with the judgment by proper averments.”⁸⁵ Merely slight mistakes will, of course, not invalidate the proceedings;⁸⁶ nor will the omission of a Christian name from the process,⁸⁷ or giving only the initials of the first and middle names of the defendant have any such effect.⁸⁸ Nor are proceedings void simply because conducted in the name of the plaintiff firm.⁸⁹ Where a process was issued to an attorney of G. commanding him to appear, but did not mention that the appearance was to be for G. it was held to make all subsequent proceedings void.⁹⁰ But where a process was addressed to the guardian instead of the ward, but duly served on the ward, the decree was held not to be void.⁹¹ If the process does not mention at all the place for the defendant's attendance, the judgment will be void,⁹² but errors and omissions on this point, which could not or did not mislead the defendant, would have no such effect.⁹³ The omission from the process of the mention of the month and giving only the year and the name of the day;⁹⁴ or fixing only a period of thirty days for the attendance of the defendant instead of giving in accordance with the statute the month and day on which the term of the Court

⁸¹ *Blanton v. Carrol*, 10 S. E. R. 329.

⁸² *Freeman v. Hawkins*, 14 S. W. R. 364.

W. v. Dickson, 28 N. E. R. 540.

W. v. Chambers, 11 Kans. 398.

W. v. Carpenter, 42 Iowa 343.

Troyer v. Wood, 10 S. W. R. 42.

Chamberlain v. Polgett, 10 S. W. R. 34.

Cotton v. Report, 27 N. W. R. 520.

⁸³ 2 Am. St. Rep. 187.

⁸⁴ *First National Bank v. Jaggors*, 31 Md. 3.

Smith v. Patten, 6 Taunt. 110.

⁸⁵ *Blum v. Chessman*, 31 S. W. R. 606.

La Grange, 42 S. W. R. 616.

R. v. G. v. S. W. R.

W. v. Peck, 44 Am.

W. v. Stott, 71 Ind.

W. v. Fogler, 40 S. W. R. 920.

W. v. Alston, 14 S. W. R. 182.

W. v. A. v. S. W. R.

W. v. N. v. S. W. R.

W. v. S. v. S. W. R.

will commence;⁹¹ or even giving a wrong date as that of the commencement,⁹⁵ or making a process returnable on Sunday,⁹⁶ does not render invalid the decision passed on the defendant's default. The omission of the signature on the process by the Judge or the clerk will also not render the subsequent proceedings void.⁹⁷ The omission of a seal from the process does not make the proceedings void, and this was held where a seal was omitted from a summons,⁹⁸ or writ of attachment,⁹⁹ or citation to a creditor of an insolvent debtor,¹⁰⁰ or garnishment process.¹ The same appears to be the correct rule in cases in which the date fixed for the return is earlier than that allowed by law,² though the contrary also is often held.³ . . .

Defective service of process gives the defendant actual notice, and although the judgment is erroneous it is not void.⁴ Mere defects in service do not make a judgment against infants void.⁵ In *Thompson v. Chicago Ry. Co.*,⁶ it has recently been held that service which cannot mislead is not void, and where a citation is required to be served by posting copies in two languages, the omission to post in one does not affect the judgment collaterally.⁷ In *Ah Men*,⁸ Paterson, J., said: "The fact that the process has not been served by the proper person, or at the proper place or time, or that the warrant or order upon which a prisoner has been arrested is void, and the arrest unlawful, will not render the judgment void, and subject to a collateral attack.⁹ After final judgment of conviction, the jurisdiction of the Court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true, even though the prisoner has been kidnapped, and forcibly brought before the Court from a foreign jurisdiction.¹⁰" In *Alabama and Vicksburg Ry. Co. v. Bolding*,¹¹ the summons for the Company was served on

⁹¹ *Cross v. Wilson*, 12 B. W. R. 576.
⁹² *Irion v. Keystone Mfg. Co.*, 16 N. W. R. 319.
⁹³ *McEvoy v. Trustees*, 38 N. J. Eq. 420.
⁹⁴ *Smith v. Smith*, 15 N. H. 55.
⁹⁵ *Ambler v. Leach*, 15 W. Va. 677.
⁹⁶ *King v. Davis*, 36 Ind. 309.
⁹⁷ *Crane v. Blum*, 56 Tex. 335.
⁹⁸ *Talcott v. Rosenberg*, 8 Daly, 203.
⁹⁹ *Gray v. Douglas*, 17 Atl. R. 320.
¹⁰⁰ *Ross v. D. V. R. Co.*, 47 Iowa, 420.
¹ *Sherrill*, 16 Wend. 33.

McGrawhorn v. Worthington, 3 R. I. R. 631.
² *Sanders v. Rains*, 10 Mo. 770.
Stimpson v. Malden, 100 Mass. 313.
Gibson v. Roll, 63 Am. Dec. 161.
Michel v. Hicks, 27 Am. Rep. 161.
v. Swarthout, 81 N. Y.

³ *Webster v. Daniel*, 14 B. W. R. 570.
⁴ *Hawkins v. McDougal*, 25 N. E. R. 620.
⁵ 19 B. W. R. 77.
⁶ *Gibson v. Foster*, 3 La. Ann. 503.
⁷ 11 Am. St. Rep. 263.
⁸ *Ex parte McGill*, 6 Tex. App. 405.
Doranto v. Sullivan, 7 Cal. 279.
Peck v. Strauss, 31 Cal. 685.
Crowns v. Hotzman, 4 Dall. 478.
⁹ *Ex parte Kellogg*, 6 Vt. 611.
¹⁰ *People v. Rowe*, 4 Park. Cr. 253.

Ex parte Scott, 4 Barn. and Cres. 446.
State v. Smith, 19 Am. Dec.
State v. Brewster, 7 Vt. 116.
State v. Ross, 41 Iowa, 467.

its station master, and the mistake was held not to affect the validity of the *ex-parte* judgment passed, on the ground of want of jurisdiction. Campbell, C.J., said:—"There are cases which hold that one sued and served by a wrong name may disregard the summons. All agree that one summoned by a name not his own, and who appears and does not plead misnomer, waives it, and is bound by the judgment in the wrong name. There is no sound reason for a distinction in the two classes of cases. The true view is, that one summoned by a wrong name, being thus informed that he is sued, although not correctly described by his true name, not availing of his opportunity to appear and object, whereby the true name would be inserted in the proceedings, should be precluded from afterwards objecting. Having remained silent when he might and should have spoken, he must ever afterwards be silent as to this matter. This view is sustained by the books.¹² There is no distinction in this respect between natural persons and corporations."

In some cases certain affidavits, applications or orders are required before an order for the constructive service of the summons, and as a general rule it has been held by the Courts that even the entire absence thereof cannot make the judgment void. The Supreme Court of North Carolina has held that all irregularities and errors in the order for publication are cured by the judgment of the Court acting thereon.¹³ Thus even in the States, in which service by publication on non-residents is allowed only on an affidavit to the effect "that the defendant cannot be found within the State after due diligence," it has been held that a statement as to the non-service on account of his residence in another State, will not render the judgment subject to collateral attack.¹⁴ The contrary has been held in some cases. Thus where the affidavit has to show not only that the defendant is a non-resident, but also that personal service cannot be made upon him within the State, the omission of the latter cause from the affidavit has been

¹² *Kirkpatrick*, 50 Am. Dec. 5.
Lafayette Ins. Co. v. French, 18 How. 404.
First Nat. Bank v. Jagers, 100 Am.
Hoffield v. Board, &c., 83 Kan. 614.
Waldrop v. Leonard, 32 B. C. 119.
Smith v. Bowker, 1 Mass. 76.
Medway Mfg. Co. v. Adams, 10 Mass. 360.
Guinard v. Heyniger, 15 Ill. 286.

Parry v. Webb, 10 Wend. 611.
Waterbury v. Mather, 16 Wend. 611.
Smith v. Patten, 6 Taunt. 115.
¹³ *Ward v. Lowndes*, 28 F. R.
¹⁴ *Kennedy v. New York Ins.*
E. R. 774.
v. Flanagan, 24 N. Y.

held to make the proceedings void.¹⁵ And in *Soule v. Hough*¹⁶ a decree was held to be void twenty years after it was passed, "because the sheriff by returning the writ four days before the return day failed to exercise due diligence to find the defendants; and it was also held to be impossible for the plaintiff to swear that the officer had used due diligence." In Minnesota, the statute requires an affidavit as to the non-residence of the defendant and as to his place of residence being unknown to the plaintiff, prior to the service of summons by publication; and in *Barber v. Morris*,¹⁷ the Supreme Court there held that that "not having been done until after the publication had been completed the Court acquired no jurisdiction, and its judgment was void."¹⁸

188. Where there is a jurisdiction over a subject-matter, but a non-compliance with any procedure prescribed as essential for the exercise of the jurisdiction, the defect, it is generally agreed may always be waived. Thus in *Pisani v. Attorney-General for Gibraltar*,¹⁹ their Lordships of the Privy Council held that the parties were bound by an agreement which they had made to the effect that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*. In that case the original information was with the consent of the parties amended so that the rights of the defendants *inter se* might be declared. Before the Privy Council, it was contended that the decree so far as it declared the rights of the defendant must be regarded as the award of an arbitrator, and that no appeal would, therefore, lie from it. Sir Montague E. Smith in delivering their Lordships' judgment said: "It is true that there was a deviation from the *cursus curiæ*, but the court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the court a jurisdiction which it does not possess, or

¹⁵ N. W. R. 50.
¹⁶ Am. St. Rep. 206.

¹⁷ N. W. R. 201.
¹⁸ N. W. R. 50.
¹⁹ 14 N. W. R. 640.

¹⁵ *Anderson v. Colburn*, 27 Wis. 356.
¹⁶ *Cummings v. Tabor*, 61 Wis. 185.
¹⁷ *Bradley v. Jamison*, 46 Iowa 22.
¹⁸ *Murphy v. Lyons*, 30 Neb.
¹⁹ L. R. 3, P. C. 315.

something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a court of appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal." His Lordship in support of this view referred in the judgment to the cases of *Morris v. Davies*,²⁰ and *Stewart v. Forbes*,²¹ and distinguished those of *White v. Buccleuch*,²² and *Bickett v. Morris*,²³ on the ground that the decision in them was *ultra vires*, and the duty of another tribunal. That decision was followed by their Lordships in *Sadasiva v. Ramalinga*,²⁴ in which the decree did not award future mesne profits, but the defendant gave security for their payment for future years while maintained in possession of the decreed lands pending appeals, and their Lordships held that the defendant came under an obligation to account in execution for the subsequent mesne profits, which was capable of being enforced by proceedings in execution, and which made the accounting a question relating to the execution of the decree, and that in any case the defendant was estopped from pleading that the mesne profits in question were not payable under the decree, as the court had general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding might have been irregular.

The same principle was recognized by their Lordships of the Privy Council in *Ledgard v. Bull*,²⁵ in which Lord Watson in delivering their Lordships' judgment said: "There are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit The plaintiff's argument as to waiver really rests upon the single fact that the defendant personally concurred with the plaintiff in petitioning the District Judge to transfer the suit in terms of Sec. 25 of the Procedure Code (from a Court which had no jurisdiction, and the defendant had

²⁰ 5 Cl. & F. 16.
²¹ 11 Me. & W. 34.
²² L. R. 1 H. L. 86, 70.

²³ L. R. 1 H. L. 8, 47.
²⁴ L. R. 1 H. L. 219.
²⁵ L. R. 3 H. L. 124.

been contending had no jurisdiction over it). The grounds of that petition had nothing to do with want of jurisdiction in the Lower Court, but were ordinary grounds of convenience, which would justify the removal of a suit to the higher court from the lower, assuming it to have been properly instituted there. Their Lordships are unable to hold that such a consent to a transfer operates as a waiver of the defendant's preliminary pleas or of any of his pleas. It is professedly and in substance nothing more than a consent that these pleas shall be disposed of by another than the Subordinate Judge."

That same view was taken by their Lordships of the Privy Council in *Minakshi v. Subramanya*.²⁶ Following these last two cases, it was adopted and acted upon in *Sankumani v. Ikoran*,²⁷ by Muttusami Ayyar and Wilkinson, J.J., who said: "The notice prescribed by Sec. 25 of the Civil Procedure Code is intended for the benefit of the party in the suit other than the party applying for transfer, and defendants in the above suit would have been entitled to object to the transfer on the ground that notice had not been given. But admittedly they by their conduct in going to trial submitted to the jurisdiction, and not only suffered the Cochin Court to pass a decree against them, but also appealed from that decree without taking any objection to the jurisdiction of the court. The only question, therefore, is whether they were at liberty to waive their objection to the validity of the order by which the Cochin Subordinate Court acquired jurisdiction. In *Ledgard v. Bull, and Minakshi Subramanya*, the Privy Council have pointed out (in them) that in cases in which a court has no inherent jurisdiction, waiver will not confer jurisdiction; but in cases in which a court has jurisdiction, but there has been some irregularity in the initial proceedings upon which it exercised jurisdiction, the defect is one which can be cured by waiver, though it may be made a valid ground of objection to the exercise of jurisdiction. It must not be overlooked that under Sec. 25 the District Court can of its own motion transfer, and the provision, therefore, as to notice is one in the nature of procedure and practice as observed in *Park Gate Iron*

²⁶ L. R. XIV I. A. 100.

²⁷ L. L. R., XIII Mad. 213.

Company v. Coates,²⁸ with reference to 13 and 14 Vict. C. 61, Sec. 14, and in *Graham v. Ingleby*,²⁹ with reference to 4 Ann. C. 16, Sec. 11. It is, therefore, clear that as the objection was not taken by the parties in the suit, but on the contrary waived, any defect in the order conferring jurisdiction on the Cochin Court must be held to have been cured."

Similarly, West, J., in delivering the judgment of the Bombay High Court in the case of *Vishnu Sakharum v. Krishnarao*,³⁰ said: "To the one case as to the other the principle applies that was laid down in *Anpurnabai's* case and in the subsequent case of *Gopalrao v. Bhavanrao*.³¹ The same principle has lately been insisted on by the English Courts in analogous cases—*ex parte Pratt*³² and *ex parte May*.³³ It is this, that where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. In the present instance, the Subordinate Judge has for many years been carrying on the execution under an order of the High Court which he was bound to obey. The High Court had jurisdiction over the matter in every aspect of it, and the sons of the judgment-debtor contested in the High Court the right of

d In this case, Sir Montague Smith, and Brett, J.J., observed that conditions precedent to the jurisdiction of the Court to hear the appeal could not be waived, but the decision turned on the ground that the provisions of Sec. 14 of the County Courts Act, 13 and 14, Vict. C. 61, that there shall be notice of appeal and security were more in the nature of procedure and practice, and to have been intended for the benefit of the respondent, and not a matter with which the public were concerned. Brett, J., observed that "where the question of jurisdiction does not arise, *Graham v. Ingleby* shows that in civil cases such conditions may be waived."

e Cotton, L. J., said in this case: "Here the debtor appeared and took no objection to the jurisdiction of the Court to make the order. And, in my opinion, if the Court then had power under the (Bankruptcy) Act of 1869 to make the adjudication, if it had proceeded in another way, and there was good ground for making it, we ought not to allow a rehearing merely because the order was made in a wrong form, the objection not having been taken at the time. It is true that at that time there had been a decision as to the legal effect of Sec. 169, different from the subsequent decision of this Court in *ex parte Pratt*, but I think we ought not, except under special circumstances, to allow a rehearing merely because, since the order complained of, was made, there has been a different decision of the Court of Appeal on a point of law." Bowen, L. J., said: "I think the true ground of our present decision is this, that the debtor had no right to allow the Court, which could have exercised jurisdiction rightly, to exercise jurisdiction on a wrong ground, and then to come to the Court of Appeal and say, 'The Court below had no jurisdiction to make the adjudication against me.'"

²⁸ L. R. 5 C. P. 634.

³⁰ L. L. R., XI Bom. 158.

the judgment-creditor as against them on exactly the same grounds that they could have taken had they been sued on the decree. They did not contend that their liability could be enforced only by a fresh suit in the Subordinate Judge's Court; and having chosen their ground, and taken their chance of victory in the execution-proceedings, they could not, and indeed did not, ask to fight the battle over again. It was the Subordinate Judge who raised the objection for them. Had there indeed been no jurisdiction over the subject-matter, the acquiescence of the parties concerned could not create it; but as there was a jurisdictional power, and the questions at issue were investigated and determined, the irregularity, according to the subsequent ruling in another case, was covered by the assent with which this court acted. See *Ex parte Anderson*,⁷¹ and *Mutaza Hossein v. Bechunnissa*.⁷² In *Puna Bibee v. Khoda Buksh*,⁷³ a suit was referred to arbitration without the consent of the parties, but without any objection by them as to the reference to arbitration, though the defendant did object to the particular persons appointed to act as arbitrators; and the High Court held that the defendant could not object against the order for the first time in special appeal, as though "it was an irregular proceeding which, if objected to in the proper way and at the proper time, might have been set aside," yet it was "not an order made entirely without jurisdiction." And that decision was followed in *Khemna v. Budoloo*,⁷⁴ in which the reference to arbitration was made in a rent-suit, in which such a reference was not allowed at all; the Court observing that "if there was any irregularity in the reference to arbitration at the request of both the parties,

we think, it is one which the respondent cannot be allowed to object to in appeal."

Mr. Hawes says "If a tribunal ever has jurisdiction over a particular cause, the jurisdiction may be restored by consent, although the power may have been executed; thus a former judgment or decree may be changed by consent. It may be assumed as a general rule, that where a court has jurisdiction over the subject-matter of a suit, irregular proof may be admitted, by consent of parties, to show that the particular cause is properly before it."³⁸

On the same principle, a voluntary appearance by the defendant is held to be a waiver of all defects and irregularities in the process issued for his attendance, and its service. Similarly, the Supreme Court of California in *Porter v. Pico*³⁹ said: "Any irregularities in obtaining the attachment were waived by the defendant when he appeared and answered without taking advantage of them, by motion or otherwise, in the course of the proceedings. The process is merely auxiliary, and the judgment in the action cures all irregularities." And this remark has been approved in *Harvey v. Foster*,⁴⁰ and the same has been held in other States also.⁴¹ This was held in *Clapp v. Graves*,⁴² though there was a positive enactment to the effect that a summons would be returnable not less than two nor more than four days from its date, and that "if such defendant be proceeded against otherwise, the Justice shall have no jurisdiction of the cause."

189. It is a settled rule of law, that the proceedings of a court having jurisdiction of the subject-matter and the parties are not void, however erroneous they may be. "It is only" said Merriman, J., in delivering the judgment of the North Carolina Supreme Court in *Brickhouse v. Sutton*,⁴³ "when a Court of general jurisdiction undertakes to grant a judgment in an action or proceeding where it has not jurisdiction of the parties or the subject-matter of the action, and this appears from the record by its terms or necessary implication, or by the absence of something essential, that the judgment will be absolutely void, and have no effect." When jurisdiction attaches in the

Errors in the exercise of jurisdiction do not affect competency of

original case, everything done within the exercise of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties,⁴⁴ and no order which a court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity, merely because it was made improvidently or in a manner not warranted by law or the previous state of the case.⁴⁵ In *Elliott v. Peirsol*,⁴⁶ Trimble, J., said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed is regarded as binding in every other court." In *Hollister v. Abbott*,⁴⁷ the New Hampshire Supreme Court said: "Where a court has jurisdiction, it has a right to decide every question which arises in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The only way for them to investigate such a judgment is by a rehearing of that cause, either by writ of error or some other legal and direct mode. For, to the extent to which the judgment goes, their rights have been considered and decided, and they have submitted to that decision, either from the force of law after a final hearing by a Court of last resort, or from a disinclination to pursue the matter further when other courses of procedure for rehearing were open before them, and might have been had if they had so elected. Upon this point the authorities are numerous and decisive." This was quoted with approval in *Haines v. Flinn*,⁴⁸ Maxwell, J., observing that it "was a correct statement of the law."

The principle underlying this rule was explained in *Voorhees v. United States Bank*,⁴⁹ in which Baldwin, J., said: "The error of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. . . . If that time elapses, common justice requires that what a defendant cannot directly do in the mode pointed out by law.

⁴⁴ *Cooper v. Reynolds*, 10 Wall. 308.

⁴⁵ *Cornett v. Williams*, 20 Wall. 326.

Herm. Comm. 54.

⁴⁶ 1 Pet. 340.

⁴⁷ 64 Am. Dec. 342.

⁴⁸ 16 Am. St. Rep. 763.

⁴⁹ 25 U. S. 449.

he shall not be permitted to do collaterally by evasion. A judgment irreversible by a superior court cannot be declared a nullity by any authority of law. If after its rendition it is declared void for any matter which can be assigned for error, only on a writ of error or appeal, then the said court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails that any proceedings of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county Court or Justice of the Peace in the Union may exercise the same right, from which our own judgments or process would not be exempt." The principle was cited with approval in *Morrill v. Morrill*,⁵⁰ in which Bean, J., in delivering the judgment of the Oregon Supreme Court, said: "After a court has acquired jurisdiction, it has a right to decide every question arising in the case, and however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent court with admitted jurisdiction of the subject-matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree because, forsooth, it was mistaken, either as to the law applicable to the facts before it or to the facts themselves. The principle is so well settled that it is said to be an axiom of the law, that when a Court has jurisdiction of the subject matter and the parties, its judgments cannot be impeached collaterally for errors of law or irregularity in practice."⁵¹ In *ex parte Sternes*,⁵² Paterson, J., in delivering the judgment of the California Supreme Court, said that it was one of the plainest of the rules, "that from the time of the service of process upon the parties to the action or proceeding the Court acquires such jurisdiction over them that its subsequent proceedings, however irregular, are not void." Mr. Wells says: "It does not matter that the evidence on which the former judgment was based had been improperly obtained. If it were acquiesced in by a failure to appeal, or if an appeal were ineffectually taken, it is nevertheless conclusive, and constitutes a positive and immovable bar to another suit on the same cause of action."^{53 54 55}

⁵⁰ 23 Am.⁵¹ *Cooper v. Reynolds*, 10 Wall
Sibley v. Waffre, 16 N. Y. 180⁵² 11 Am. St. Rep. 251⁵³ *Kelly v. Mize*, 3 Need.

As to probate proceedings, Clapton, J., in delivering the judgment of the Alabama Supreme Court in *Goodwin v. Sims*,⁵⁵ said, still more broadly, that "it is well settled that the jurisdiction attaches when a petition is filed by a proper party, setting forth any of the statutory grounds for a sale; and that jurisdiction having once attached, any intervening errors or irregularities in the proceedings will not avail to avoid the sale when collaterally impeached. It has accordingly been held that though the failure to issue citation to the resident heirs, or to make publication to the non-residents, will be sufficient to reverse the proceedings on appeal, such failure does not affect the validity of the order of sale on a collateral attack."⁵⁶ In *Semple v. Glenn*,⁵⁷ Clapton, J., in speaking of the judgment of a court in another State, said: "It may be that the record and proceedings abound in errors and irregularities, but the decrees are not void." Mr. Freeman says: "Jurisdiction being obtained over the person and over the subject-matter, no error or irregularity in its exercise can make the judgment void."⁵⁸ The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Error of decision may be corrected, but not so as to reach those who have in good faith relied upon its correctness."⁵⁹ In *Estate of Newman*,⁶⁰ Paterson, J., in delivering the judgment of the California Supreme Court, said: "The fact that judgment was rendered upon default entered before the time allowing the defendant to answer had expired rendered the judgment erroneous simply, not void." In *Mitchell v. Aten*,⁶¹ Horton, C.J., in delivering the judgment of the Kansas Supreme Court, said: "Jurisdiction having been obtained, the fact that the judgment was rendered sooner than it should have been does not make the judgment void: a judgment thus rendered is irregular only."

The same view has been taken with reference to the Indian Law. In *Rewa Mahton v. Ram Kishen Singh*,⁶² two parties had cross-decrees against each other for different amounts, and notwithstanding Sec. 246 of the Civil Procedure Code, exe-

⁵⁵ 11 Am. St. Rep. 22.

⁵⁶ Field v. Golladay, 28 Ala.

⁵⁷ 24 Am. St. Rep. 87.

⁵⁸ Wimbush v. Breeden, 77 Va. 324.

Rosenheim v. Hartsock, 90 Mo. 367.

Levan v. Malholand, 14 Pa. St. 40.

See Sellers, 100 Ind. 101.

See Ballard, 4 Ala. 412.

See Cottage, 51 Am. 177.

2 Wash. 201.

e.

See Smith 19 A. 31.

See Ward, 43 Kan. 697.

Clond v. El Dorado Co., 73 Am. Dec. 526.

Preston v. Clark, 9 Ga. 246.

Boston &c. R. R. Co., v. Sparhawk, 70 Am. Dec. 750.

Calhoun v. Ingouf, 14 La. Ann. 623.

Fleming v. 26 Ark. 421.

Chase v. 41 Ca. 220.

Mooney v. 11 Am. St. Rep. 131.

Parsy v. 12 Am. Dec. 320.

60 7 Am. St. Rep. 146.

61 1 Am. St. Rep. 231.

62 L. R. VIII I. A. 196.

cution was taken of the decree for the smaller amount, and the High Court held that all the execution proceedings were void. The High Court, after quoting Sec. 246, said: "It was not competent to the Mansif by his judgment to modify this provision of the law, even if it were his intention to do so. . . . Nor does it appear to us that there was anything in the plaintiff's conduct which could render legal and valid proceedings of the defendant, which were without the sanction of law. When the defendant, on the 31st August, applied for execution of his cross-decree for a smaller amount, he must have been aware that the plaintiff's decree had been produced to the Court, and that since the order of the Appellate Court, 26th July 1878, it was capable of execution. The defendant accordingly had no right to execution, except as provided by Sec. 246, and the whole of the subsequent proceedings taken in execution of the defendant's decree were, in our opinion, a nullity, and must be set aside." This decision was reversed, however, by their Lordships of the Privy Council, and Sir Barnes Peacock in their Lordships' judgment said, "The defendant appellant purchased *bonâ fide*, and for a fair value, property exposed for sale under an execution issued by a court of competent jurisdiction upon a valid judgment. . . . A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." In *Bateshar Nath v. Faizul Hasan*,⁶⁷ the High Court considered that the assistant collector's proceedings were in some respects irregular or defective, but still held his decision in them to be *res judicata*. In *Meerjah Janand v. Krishto Chunder*,⁶⁸ Mr. Field, J., in delivering the judgment of a Division Bench of Calcutta High Court said: "We think there can be no doubt that if a Collector, professing to proceed under the provisions of Sec. 38 of the Rent Act (Bengal Act No. VIII of 1869), does not

expressly enacted there by Sec. 6 of 29 Car. II, C. 7, that no person or persons upon the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment or decree, and that any such service, if made, shall be void to all intents and purposes whatsoever. The same view is taken in the United States on the authority of Common Law of the character of judicial proceedings taken on Sundays.⁶⁹ The same appears to be held by the American Courts in regard to judgments delivered on other days, expressly made holidays by Statute.⁷⁰ On general principle, these decisions appear to be wrong, as a court sitting on a holiday is not otherwise than *de facto*. The English Courts have therefore taken a different view. Speaking of Good Friday, Easter Eve, and certain other holidays prescribed by the rules of Hilary Term, 6 Wm. 4, Petersdorff, in his abridgment of Common and Statute Law⁷¹ says, "These are not *dies non*, but periods of vacation for the courts and officers. The proceedings are not suspended. The offices may be opened at any time when regularly they are shut. They are closed on a holiday for the benefit of the officers, and if they think fit to attend they may; and if open, judgment may be signed."⁷² The analogy of Sunday cannot certainly apply to other holidays, as there is no similar provision enacted in regard to them, as there is in regard to Sundays.

In this country a sale of property in execution of a decree on a close holiday has been held to be valid.⁷³ In *Ram Das v. The Official Liquidator*,⁷⁴ a decision was passed on an enquiry, a part of which was made in the presence of the parties and without any objection from them, on certain days that had been prescribed under, and were required to be observed, as holidays under Sec. 17 of the Bengal Civil Courts Act 1871; and on an appeal from the decision it was contended that "the Judge had no jurisdiction, and the parties could not, by consent or otherwise, give him, as a Judge, jurisdiction to

g The decision in *Ekker v. First National Bank*,⁷⁵ is not against that view, although in that case a judgment dated Sunday was held to be not void, yet the record showed that that date was a

⁶⁹ *Allen v. Godfrey*, 44 N. Y. 433.

Ex parte White, 37 Am. Rep. 466.

Vide Dicta in—

Shearman v. State, 28 Am. Rep. 403.

Blood v. Bates, 31 Vt. 147.

Pearce v. Atwood, 13 Mass. 324.

Story v. Elliott, 18 Am. Dec. 423.

Davis v. Fish, 48 Am. Dec. 397.

⁷⁰ *Hemmens v. Bentley*, 22 Mich. 60.

Sitting of a Circuit Court, 1 New Zeal

in Eaton v. Mitchell, 14 All.

v.

Ed. v

⁷¹ *Bennett v. Potter*, 2 C. & J. 623.

⁷² *Bisram Mahton v. Sahib-un-nissa* L. L. III, All. 393.

⁷³ L. L. R. IX All. 308.

⁷⁵ 1 Ast. Rep. 640.

enter upon the inquiry, or to hear or determine the matter which was before him, or, in fact, any matter on the civil side of his court, upon a day which was one of those included in the list prepared by this court of days to be observed as close holidays in the courts subordinate to this Court." Sir John Edge, C. J., (Oldfield, J., concurring) said that Sec. 17, "was framed in the interests of the Judges and the officials of the courts, and probably also in that of the Hindu and Muhamadan pleaders, suitors, and witnesses, whose religious observances might interfere with their attendance in court on particular days. . . . If it had been intended by the Legislature that a judge should have no jurisdiction or power to enter upon a judicial proceeding or inquiry on a close holiday, and that if the judge did on a close holiday hold a judicial inquiry the proceedings should be void, it would have been easy for the Legislature to have expressed such intention by the use of apt words, such as we find in Sec. 6 of the Lord's Day Act. . . . We are of opinion that on such a close holiday as that in question, a Judge might properly decline to proceed with any inquiry, trial or other matter on the civil side of his court; and any party to any judicial proceeding, if present, could successfully object to any such inquiry being proceeded with; and in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceedings set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity. In this case the question arises whether a party who, on a close holiday, does attend, and without protest takes part in a judicial proceeding, can subsequently successfully dispute the jurisdiction of the judge to hear and determine the matter on such close holiday. It appears to us that at the furthest the entertaining on a close holiday, and deciding upon a matter within the ordinary jurisdiction of the Court, is an irregularity the right to object to which can be, and was in the case, waived by the conduct of the parties."

191. Nor can the competency of jurisdiction be affected by the unauthorized character of the place where the proceedings are held. Mr. Freeman says, "We have not been able to discover any decision, in which the question was involved, holding that a judgment rendered by a

Proceedings at unauthorized place are not

court sitting at a place other than that designated by law is void. On the contrary, so far as the question has been judicially considered, judgments have been protected from collateral assault on that ground, and it may fairly be inferred from the decisions made that a court may, when necessary, hold its session and pronounce judgment at places other than those appointed by law."⁷⁶ The contrary has been held in Georgia,⁷⁷ but that is because a special Statute there expressly provides that a judgment rendered at any place other than that authorized will be void. The Maine Supreme Court also held in *White v. Riggs*,⁷⁸ that an order granting probate of a will, passed at a private house was void, but the Tennessee Supreme Court held in *Cheatham v. Brien*,⁷⁹ that a judgment rendered at a place four miles from the court was valid; and even a judgment rendered at one's house was held to be valid in *Price v. Peters*,⁸⁰ but in that case it was rendered there with the consent of the parties.

It appears to be generally agreed upon that the judicial acts done by a judge outside his territorial jurisdiction are void,⁸¹ and an order to an administrator to lease land made by a judge while in another country has been held void on that ground.⁸² The same view was taken in *Block v. Henderson*,⁸³ in which Simmons, J., in delivering the judgment of the Georgia Supreme Court, observing that a judge outside the local limits of his jurisdiction, is not a judge, said, "He was no more than any private citizen; and any judgment he gave outside of his jurisdiction whether by agreement, waiver or otherwise, was no more binding upon the parties than if it had been made before a private individual." The contrary has been held by the California Supreme Court on the ground that the court passing the judgment at an unauthorized place is a *de facto* Court.⁸⁴ In England the proceedings of a Court Baron held of the manor were held void in *Leach v. Whittake*,⁸⁵ but a Court baron is a Court of a very peculiar character, and the decision does not appear to have been followed. There has not been any general authoritative decision on the point in England or India.

⁷⁶ *Le Grange v. Ward*, 11 Ohio, 257.

Herndon v. Hawkins, 65 Mo. 265.

⁷⁷ *Borzeman v. Singer Mfg. Co.*, 70 Ga.

State v. Simmons, 11 Ga. 120.

Block v. Henderson, 58 E. R. 877.

⁷⁸ 27 Me. 114.

⁷⁹ 3 Head 552.

⁸⁰ 14 Am. R.

R

, 63 Mo.

⁸¹ 5 B. & Ad. 400.

192. A judgment is not void, simply because it is erroneous. This must be quite evident from the very notion of jurisdiction, which is the power to determine, not merely the power to determine rightly. Mere error in a judgment does not render it void. Any number of decisions may be cited in support of this view,⁸⁶ and a large number is cited by Mr. Vanfleet, whereof a few⁸⁷ may be referred to here. Thus "the wrongful allowance of interest,"⁸⁸ or a mistake in the amount due to a legatee,⁸⁹ or in apportioning liens,⁹⁰ do not make the judgment void; nor is it void because it is not a logical sequence from the opinion.⁹¹ Where a court has power in certain cases to render the proper judgment itself instead of reversing and remanding for a new trial, a judgment so rendered by it is not void because the case was not a proper one.⁹² A judgment discharging the sureties on an administrator's bond is not void because erroneous.⁹³ A decree founded upon an erroneous construction of a will is not void for that reason,⁹⁴ nor does an error in deciding that a will makes a constructive appointment of an executor, make the appointment void.⁹⁵ "Mr. Freeman citing a number of American decisions says,⁹⁶ "Neither can the force of a judgment as *res judicata* be destroyed or impaired by showing that it was clearly erroneous, and ought not to have been rendered, whether such error resulted from the court drawing an erroneous conclusion from conceded or established facts,⁹⁷ or making a ruling during the progress of the trial whereby evidence was erroneously admitted or excluded, or the law misstated to the jury, or one of the parties was otherwise deprived of the benefit of his cause of action or defence or of some part thereof."⁹⁸ Nor is the effect of a judgment as *res judicata* lessened when the fact that it is erroneous is established by the decision of the highest appellate tribunal in the State, rendered in another action.⁹⁹ "Even a judgment against a bank on a confession by its president, when no law gave him such a power, has been held not to be void.¹⁰⁰ Mr. Freeman says "The following judgments even though irregular are not void."

⁸⁶ *Sturgis v. Rogers*, 26 Ind. 1.

⁸⁷ *Law*, Col. Att. 780.

⁸⁸ *Judge of Probate v. Robins*, 5 N. H. 246.

⁸⁹ *Supervisors v. United States*, 4 Wall. 435.

⁹⁰ *Holden v. Lathrop*, 32 N. W. R. 879.

⁹¹ *Central Trust Co. v. Seasongood*, 9 S. C. R. 373.

⁹² *West Feliciana R. R. Co. v. Thornton*, 68 Am. Dec. 778.

Mc Crummin v. Cooper, 37 Tex. 423.

⁹³ *Veach v. Rice*, 9 S. C. R. 730.

⁹⁴ *Britain v. Owen*, 5 Humph. 314.

⁹⁵ *Grant v. Spann*, 24 Miss. 204.

⁹⁶ *Fr. Jud.* 444.

⁹⁷ *Law v. Worth v. Chicago R. R. Co.* 134 U. S. 688.

Peck v. Culberson, 104 N. C. 425.

Crenshaw v. Julian, 4 Am. St. Rep. 719.

Linahan v. Hathaway, 54 Cal. 251.

⁹⁸ *Winslow v. Stokes*, 67 Am. Dec. 242.

Sayre v. Harpold, 33 W. Va. 553.

⁹⁹ *Stevenson v. Edwards*, 93 Mo. 6.

Frost v. Frost, 21 S. C. 501.

Brown v. Guthrie, 39 Hun.

¹⁰⁰ *Drexel's Appeal*, 6 Pa. St.

¹ *Fr. Jud.* 252.

“Judgments on obligations not yet due,² or entered before the expiration of the time allowed to answer,³ or based upon an assessment of damages by the court when a party was entitled to a jury,⁴ judgment in the absence of taking evidence and making findings, the statute requiring the court, before proceeding to judgment to take evidence and make findings;⁵ a judgment against lands for a sum in gross, when it should have been against each parcel separately,⁶ or on a demand which the record shows was barred by the Statute of Limitations,⁷ an order approving the surrender to the firm creditors by the survivors of a partnership of the interest of a deceased partner,⁸ an order making an irregular and erroneous appointment of an assignee in bankruptcy,⁹ a decree authorizing a sale without redemption when the statute gave the right to redeem,¹⁰ a judgment based on irregular but amendable proceedings in attachment;¹¹ an order approving the bond of an assignee in insolvency in a sum less than that fixed by a previous order of the court;¹² an order alleged to have been influenced by the interests of infants, when the court had no right to consider such interests;¹³ a decree in foreclosure which was founded on a complaint which did not set out the conditions of the mortgage foreclosed;¹⁴ a decree appointing a new trustee, without giving notice to the trustee superseded thereby.¹⁵” In *Hope v. Blair*,¹⁶ it was contended that the Court had no jurisdiction of the subject-matter of the suit, as the estate which the decree attempted to charge was not the separate estate in equity of the married woman; but Macfarlane, J., in delivering the judgment of the Missouri Supreme Court said: “When the Court has cognizance of the controversy as it appears from the pleadings, and has the parties before it, then the judgment or order which is authorized by the pleadings, however erroneous, irregular, or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the ‘soundest principles of public policy.’ ‘It is one’ says the Court of Virginia ‘which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a Court of competent

² *Vide*, *Supra*, S. 181.

³ *Easing v. Lower*, 120 Ind. 239.

⁴ *Solomon v. Newell*, 67 Ga. 572.

⁵ *Carter v. Boland*, 53 Tex. 540.

⁶ *Garner v. State*, 28 Kan. 790.

⁷ *Johnston v. San Francisco S. U.*, 7 Am. St. Rep. 129.

⁸ *Pritchard v. Madren*, 31 Kan. 35.

⁹ *Head v. Daniels*, 35 Kan. 1.

¹⁰ *Tua v. Carriere*, 117 U. S. 201.

¹¹ *Raymond v. Morrison*, 50 Iowa, 371.

¹² *Moore v. Jeffers*, 53 Iowa, 202.

¹³ *Gonnolly v. Edgerton*, 22 Neb. 82.

¹⁴ *Harvey v. Foster*, 64 Cal. 290.

¹⁵ *Lubra v. Kelly*, 67 Cal. 289.

¹⁶ *Woodhouse v. Fillbates*, 77 Va. 317.

¹⁷ *Berry v. King*, 15 Or. 267.

¹⁸ *Bassett v. Crafts*, 120 Mass. 513.

¹⁹ *McKim v. Doane*, 137 Mass. 105.

²⁰ 24 Am. St. Rep. 366.

jurisdiction, and after the period has elapsed when it becomes irreversible for error, another Court may, in another suit, inquire into the irregularities or errors in such judgment, there would be no end to litigation, and no fixed established rights."¹⁷ The Court unquestionably had jurisdiction of the subject-matter. Inquiry cannot be made in this collateral proceeding whether the Court committed error, either in law or fact; the judgment is conclusive." In *Maloney v. Dewey*,¹⁸ Scholfield, J., in delivering the judgment of the Illinois Supreme Court, said: "Whether the decree is erroneous in respect of the order of sale or not cannot affect the jurisdiction of that Court to render final decree." In *Indiana B. & W. Ry. Co. v. Allen*,¹⁹ Elliott, J., in delivering the judgment of the Indiana Supreme Court, said: "If it were granted that the Court erred in dismissing the proceedings, that error would be of no avail in this collateral proceeding. An erroneous judgment stands, as between the parties, until overthrown by a direct attack." In *Spencer v. Parsons*,²⁰ Holt, J., in delivering the judgment of the Kentucky Supreme Court, said: "It is well settled that a judgment which is merely erroneous cannot be assailed collaterally. If the Court has jurisdiction of the person and the subject-matter, then, however irregular may be the proceeding, the judgment is merely erroneous, and is binding until reversed or vacated in the manner provided by law."

193. Indian Evidence Act, 1872, Sec. 44, lays down that any party to a suit or proceeding may show that any judgment, order or decree which is relevant was obtained by fraud. Fraud does not render a judgment void. It does not provide however as to the effect of the fraud thus shown, and the nature of the effect must be determined on general principles. The courts are not quite agreed to it even in regard to the validity of a judgment. In *Mewa Lall v. Bhujhun*,²¹ Phear, J., in delivering the judgment of the Calcutta High Court, said: "It is always a rule of the English Courts that while no court but a court of appeal can interfere with the decree of a court of competent jurisdiction, yet if the decree has been obtained by fraud, it shall avail nothing for or against the parties affected by it, even in another court."

¹⁷ *Lancaster v. Wilson*, 27 Gratt. 624.

See also—

— v. Hartwick, 91 Mo. 365.

Morris v. Gentry, 90 N. C. 246.

Porter v. Gile, 47 Vt. 630.

Paul v. Smith, 82 Ky. 451.

¹⁸ 11 Am. St. Rep. 135.

¹⁹ 3 Am. St. Rep. 650.

²⁰ 25 Am. St. Rep. 555.

²¹ XXII W. R. 213.

The other High Courts have taken a different opinion however. Thus a Division Bench of the Madras High Court held in *Venkatramanna v. Viramma*,²² that a decree would be binding on the parties, even if it should have been obtained by them conclusively to defraud third parties. In *Ahmedbhoy v. Vulleebhoy*,²³ Latham, J., held that a judgment obtained by fraud would, in every case, be binding on the parties and those claiming under them. The same view has been taken in *Chenvirappa v. Puttappa*,²⁴ by West and Birdwood, JJ., who said: "It had been said, indeed, that a decree obtained by fraud may be impeached in any collateral proceeding. (See per Willes, J., in *The Queen v. The Saddlers' Company*²⁵). This must be understood, it seems, as 'impeached by one not a party to the fraudulent decree.'"²⁶ In England, in *Earl of Randon v. Becher*,²⁷ Lord Brougham, after saying that it was undeniably true that the Court of Chancery had no right to review a decree of the Court of Exchequer, added,²⁸ "but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim or to the defence of a right. It is not an irregularity, it is not an error which is here complained of; but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up." And in *Philipson v. Earl of Egremont*,²⁹ on a *scire facias* against the defendant, a shareholder in a company, under 7 Wm. IV, and 1 Vic. c. 75, on a judgment obtained by the plaintiff in a previous action against the registered officer of the company, the Court of Queen's Bench held good a plea that "the registered officer fraudulently and deceitfully and by connivance with the plaintiff suffered the judgment in order to charge the defendant." In its decision the Court relied on the opinion expressed in *Fowler v. Rickerby*³⁰ by Tindal, C. J., that such a plea would be good; and though agreeing with the opinion expressed by Parke, B., in *Bradley v. Eyre*³¹ and *Bradley v. Urquhart*,³² that relief from fraud might also be had by motion to the Court, differed from his *dicta* in those cases to the effect that such a plea would be bad. The technical ground on which the

²² 1 L. L. R. X Mad. 17.²³ 1 L. L. R. VI Bom. 703.²⁴ 1 L. L. R. XI Bom. 708.²⁵ 30 L. J. Q. B. 199.²⁶ *DeMetton v. DeMello*, 2 Camp. 420.²⁷ 3 Cl. & F. 497.²⁸ 6 Q. B. 587.²⁹ 2 M. & G. 776.³⁰ 11 M. & W. 430.³¹ 11 M. & W.

Queen's Bench proceeded was, that there had been no previous opportunity to plead the fraud and collusions alleged. The cases of the *Earl of Bandon v. Becher*, and *Philipson v. Lord Egremont*, were referred to with approval by Willes, J., in *Queen v. Saddlers' Company*,⁵³ with the observation that "a judgment or decree obtained by fraud upon a court, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding."

In the United States, Mr. Vanfleet lays down broadly that "fraud in a domestic judgment never makes it void."⁵⁴ That the fraud of either of the parties does not have this effect against the other party appears to be almost generally agreed upon,⁵⁵ on the ground that it is a matter for plea in the suit in which the judgment was rendered. In *Mason v. Messenger*,⁵⁶ the Court said: "If a judgment can be attacked for fraud in any case, it can only be by a direct proceeding." In *Ogle v. Baker*,⁵⁷ McCollum, J., said: "A judgment or decree procured through the fraud and collusion of the parties to it, for the purpose of defrauding a third person, may be attacked by such person in a collateral proceeding, because he has no standing to appeal from it, or to require that it be vacated or reversed. A party, however, who alleges that a judgment has been obtained against him by fraud may assail it directly by appeal from or motion to open it, but he cannot impeach it in an action to recover the money collected by regular process issued upon it." It has sometimes been held even without any qualification, that a judgment may be attacked by a party to it on the ground that it was obtained by fraud.⁵⁸ In *Graham v. Boston Ry. Co.*,⁵⁹ this was doubted, but admitted to be the correct law, "when the time for proceeding against it has passed without the fault of the injured party." It appears to be settled however that a decision cannot be impeached collaterally by either of the parties on the ground that it has been obtained by the fraud of the opposite party, and that fraud in procuring a judgment in a suit cannot be shown by a party to the suit in any collateral proceeding.⁶⁰ In *Ambler v. Whipple*,⁶¹ Shope, J., said, "Domestic judgments and those standing

⁵³ 10 H. L. Cas. 431.

⁵⁴ Law. Col. Att. 574.

⁵⁵ *Homer v. Fish*, 11 Am. Dec. 218.

McRae v. Mattoon, 13 Pick. 53.

White v. Merritt, 37 Am. Dec. 527.

Hillsborough v. Nichols, 46 N. H. 379.

⁵⁶ 17 Iowa, 261.

⁵⁷ 21 Am. St. Rep.

⁵⁸ *Hall v. Hamlin*, 2 Watts, 354.

State v. Little, 1 N. H. 257.

⁵⁹ 115 U. S. 161.

⁶⁰ *Carpentier v. Oakland*, 30 Cal. 439.

Smith v. Smith, 22 Iowa, 516.

People v. Downing, 4 Sand. 159.

Blanchard v. Webster, 62 N. H. 467.

⁶¹ 32 Am. St. Rep. 212.

upon the like footing import verity, and public policy forbids their indirect and collateral contradiction or impeachment. If a party has been over-reached, the law furnishes him ample remedy to avoid the consequences of the fraud in the court and jurisdiction where the judgment or decree is rendered. If appellant sought to take judgment contrary to his representations and assurances, appellee might have appeared in that court by himself or solicitor, and prevented its consummation; or if, by the fraud of appellant, he was prevented from interposing his defence before the decree was entered, he might and should have applied to that court for its vacation, and to be let in to defend on the merits.¹² We are aware that in some of the earlier cases in this State there seems in effect, to be a contrary holding, but the rule stated is, we think, as applicable to the courts of law, supported by the weight of authority."

The question was discussed at length in *Morrill v. Morrill*,¹³ in which Bean, J., in delivering the judgment of the Oregon Supreme Court, said: "It is a general rule at common law that parties and privies to a judgment may not attack it collaterally for fraud. After a party has been duly served with process, it is his duty to see that such a judgment is not obtained against him, and if it is, he must take some proper proceedings to have it annulled. As long as it remains in full force and effect, the parties cannot treat it as invalid, unless such invalidity appears upon the face of the judgment. It is true, fraud vitiates every transaction into which it enters, even a judgment; but such fraud must be made to appear in some appropriate proceeding known to the law. The statute points out ample methods by which a party may be relieved from such a judgment,—such as a new trial, review for error of law, an application to be relieved therefrom. And beyond the methods provided by statute, courts possess inherent powers, as has been said, 'to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake.' These methods, however, must be resorted to. They give no countenance to the idea that a judgment wrongfully obtained may be completely ignored, and the rights of the parties again inquired into in a collateral pro-

¹² *Bae v. Hulbert*, 17 Ill. 572.

¹³ 21 Am. St. Rep. 97.

ceeding.⁴⁴ From these and many other authorities that could be cited, we take the law to be, that a judgment of a court of this state, having jurisdiction over the subject-matter and the parties, cannot be questioned collaterally for fraud *aliunde* the record, by the parties or privies. The case relied upon by the respondent as announcing a contrary doctrine is *Mandeville v. Reynolds*.⁴⁵ This was an action on a judgment, the defence to which was based upon a satisfaction of the judgment of record, and upon an order of Court ratifying that satisfaction. The plaintiff offered to show that the entry upon the docket and the order was obtained by fraud and collusion. The Court held that such evidence was competent, and in the opinion there are statements to the effect that a judgment obtained by fraud could be attacked collaterally. This decision was made under the reform code of procedure of the State of New York, which permits equitable defences to be pleaded in actions at law, and the Court says: 'The Court acts upon the matters involved in the action, now, in a double capacity: as a court of law and a Court of Equity. As a Court of Equity, it meets the questions of the validity of the judgment, not as one of law, but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which, by the changing nature of the suit and trial, has become the main question, and legitimately before it for trial.' In this State, the distinction between proceedings at law and in equity is still maintained.⁴⁶ Authorities under the reform codes of procedure are therefore not applicable here."

In *Engstrom v. Sherburne*,⁴⁷ it has been held that false or perjured evidence is not such fraud as to render a judgment void, not even if the demand is a show and there is a conspiracy; and that there may be a real cause, a real issue, a real trial, and therefore a real judgment notwithstanding such evidence. It has thus been said that a judgment may be impeached for fraud, but a judgment obtained by fraud may not be impeached. In *United States v. Throckmorton*,⁴⁸ a bill was brought in Chancery for the purpose of setting aside a decree of confirmation of a grant in favor

⁴⁴ *Davis v. Davis*, 61 Me. 30.
Murray v. White, 36 Vt. 45.
Granger v. Clark, 23 Me. 128.
Roston & W. Corp. v. Sparhawk, 70 Am.
 750.
Krakeler v. Ritter, 62 N. Y. 172.
Woss v. Overmanu, 100 Ind. 419.

— *v. Griswold*, 9 Mo. 775.
Mason v. Messenger, 17 Iowa, 261.
⁴⁵ 64 N. Y. 528.
⁴⁶ *Burrage v. Bonanza G. & Q. M. Co.*, 12 Or.
 100.
⁴⁷ 137 Mass.
⁴⁸ 98 U. S.

of R. on the ground that he had, during the pendency of the proceedings for confirmation, become satisfied that he had no sufficient evidence of the grant, and to supply this defect, obtained from M. a former governor of California, his signature to a grant, and falsely antedated it so as to impose on the Court the belief that it was made while M. had power to make it, and that, in support of this false document, he procured and filed therewith the depositions of perjured witnesses. In affirming the decree of dismissal of the bill, the United States Supreme Court said : "That the mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. The case before us comes within this principle. The genuineness and validity of the concession from M. produced by complainant was the single question pending before the board of Commissioners and the District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice ; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document." This decision has been followed and frequently applied by subordinate national Courts.⁴⁹

In *Pico v. Cohn*,⁵⁰ *Beatty*, C.J., said ; "That a former judgment or decree may be set aside and annulled for some frauds, there can be no question ; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end

⁴⁹ *Oetzhausen v. Kerting*, 29 Fed. Rep. 821.
Hilton v. Guyott, 43 Fed. Rep. 252.
United States v. White, 17 Fed. Rep. 561.

United States v. Hancock, 30 Fed. Rep. 888.
⁵⁰ 25 Am. St. Rep. 180.

of litigation ; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the Court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these : Keeping the unsuccessful party away from the Court by a false promise of a compromise, or purposely keeping him in ignorance of the suit ; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or being regularly employed, corruptly sells out his client's interest.⁵¹ In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial ; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defence can be supported in no other way ; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy." Dr. Bigelow says : " A judgment cannot be set aside, or impeached collaterally, upon the mere ground that false evidence, such as a forged document, was given on the trial ; nor can an action be maintained for damages sustained by the enforcement of a judgment obtained through false and perjured evidence."⁵² He adds, however, that a judgment may be set aside or impeached collaterally for fraud that is " actual, and consists, (1) in ' meditated and intentional contrivance to keep the parties and Court in ignorance of the real facts of the case, and obtaining the judgment by such contrivance,'⁵³ or (2) in facts relating to the manner of obtaining jurisdiction of the cause, to the mode of conducting the trial, or to some conco-

⁵¹ *United States v. Throckmorton*, 96 U. S. 63, 66.

⁵² *Big.* 66.

⁵³ *Ward v. Southfield*, 103 N. Y. 267.

tions of the judgment, or (3) in facts not actually or necessarily in issue at the former trial."⁵⁴

194. Dr. Bigelow says that a judgment may be set aside for actual fraud consisting in facts relating to the manner of obtaining jurisdiction.⁵⁵ In *Demeritt v. Lyford*,⁵⁶ the New Hampshire Supreme Court said: "Any fact may be alleged or proved which goes to take away the jurisdiction, and if apparent jurisdiction has been conferred by fraud or collusion, the judgment may be impeached on that ground." In *Carr v. Miner*,⁵⁷ the Illinois Supreme Court held that fraud in procuring a judgment was a defence to an action upon it. In *Russell v. State*,⁵⁸ the Kansas Supreme Court said: "The records of a Court import absolute verity, and the parties to a suit are concluded by its judgment. Yet if it be shown that judge and clerk have fraudulently combined and entered up a false judgment, its rottenness destroys it altogether. It concludes nobody. No rights can rest upon it." The contrary has been held in some cases. Thus in Illinois a judgment was held not to be void on the ground that the plaintiff had bribed a Deputy Sheriff to make a false return of service.⁵⁹ In California it was held that a judgment against a city could not be overturned collaterally on the ground that service was fraudulently and collusively made on an ex-mayor who collusively employed an attorney to appear for the city.⁶⁰ It has even been sometimes held that proceedings are not void on the ground that the defendant was decoyed or enticed,⁶¹ or fraudulently detained,⁶² within a State with intent that he may be served there with process. The weight of authority appears, however, to be against this view, at least where jurisdiction is obtained over a foreigner by fraud. Thus in *Duntap v. Cody*,⁶³ it was held that foreign Courts would not enforce a judgment in a suit, in which jurisdiction over the defendant was obtained by service of process in the State to which he was induced to go by false representations. In *Tebbetts v. Tilton*,⁶⁴ the New Hampshire Supreme Court held a decree of the discharge of an administrator to be void on the ground of his having fraudulently kept back a part of the estate, and said: "The fraud alleged as avoiding the judg-

⁵⁴ Big. Fr. 97.

⁵⁵ Big. Fr. I. 97.

⁵⁶ 27 N. H. 541.

⁵⁷ 42 Ill. 179.

⁵⁸ 11 Kan. 322.

⁵⁹ *Rivard v. Gardner*, 39 Ill. 125.

⁶⁰ *Carpentier v. Oakland*, 30 Cal. 439.

⁶¹ *Luckenback v. Anderson*, 47 Pa. St. 123.

Pool v. January, 37 Am. Rep. 27.

⁶² *Ex-parte Everts*, 2 Disney, 33.

⁶³ 7 Am. Rep. 1.

⁶⁴ 31 N. H. 288.

ment relates to a concealment of a portion of the estate of the deceased. This is a matter affecting the jurisdiction of the Court. . . . The jurisdiction depends entirely upon the fact that all the estate is expended in the manner provided. Any fact upon which the jurisdiction depends may be denied, unless, perhaps, in the case of an express decision upon the point." But in later cases, the Court has held that an order to sell land procured by the fraud of the administrator,⁶⁵ or by his fraudulent representation that the personal estate was insufficient to pay the debts,⁶⁶ or when he knew that there were no debts,⁶⁷ is not void. Mr. Vanfleet says: "The allegations of the complaint give jurisdiction over the subject-matter, and the seizure of the property gives jurisdiction over the person; and when jurisdiction over both subject-matter and person is once obtained, neither errors in obtaining nor in retaining it will make the proceedings void."⁶⁸ However, evidence of fraud *aliunde* the record cannot be heard to dispute the judgment, even when the fraud is in obtaining jurisdiction.⁶⁹

⁶⁵ Blanchard v. Webster, 62 N. H. 467.

⁶⁶ Gordon v. Gordon, 55 N. H. 329.

⁶⁷ Boyd v. Blankman, 87 Am. Dec. 146.

⁶⁸ Law Col. Att. 243.

⁶⁹ Williams v. Haynes, 19 Am. St. Rep. 752.

CHAPTER VIII.

JUDGMENTS *In Rem*.

195. It has been explained in Chapter IV, that a judgment, as a rule, affects only the parties to the suit in which the judgment has been rendered, or those claiming under or through them and in some cases even those represented by them. There are some exceptions to this rule, and in the case of those exceptions judgments pronounced are considered not *inter partes*, but *inter omnes*, and are valid as against all the world. Phillips and Holloway, J.J., in *Yarakalamma v. Naramma*¹ said—"Savigny observes that one may bring these exceptions to a common point of view by saying that the third party, to whom the effects of *res judicata* are extended was represented by one of the parties, but this is not a principle absolutely explaining the reason of all these exceptions; there will still remain certain isolated cases established by positive law; this general point of view shows us the analogy of these different cases and why they are subjected to an exceptional rule. After saying that it was once a very prevalent opinion that the exception applied to all cases relating to status, he shows that there are in fact only two cases of this kind to which it applies: (1) where there is a question of the legitimacy of a child and of the paternal authority in a case to which the father is a party, the judgment given binds not only the father but all the members of the family, and especially the brothers and sisters of the child, (2) where there is a cause as to the validity of a testament between the testamentary heir and the heir-at-law, the judgment will bind all those who derive their rights from the testament as legatees emancipated, &c. We see therefore that the extension of the force of the *res judicata* to persons not parties to the suit was very carefully guarded, and proceeded upon very intelligible principles, that it was by no means the law that every decree in an *actio in rem* was so extendible. Moreover these exceptions were made upon grounds of positive law, and the principle underlying them all was that the nature of the process was such that third persons might be considered as

actually parties to it, although not formally so." These exceptions are the foundation of the judgments *in rem* of the English law. The learned judges thus went on to add—"that the rule which makes a judgment conclusive only against the parties and those who claim under them is subject to certain exceptions which are the offspring of positive law, and that the reasons for the exception may be generally stated to be, both in English and Roman law, that the nature of the proceedings, by which there is a fictitious, though generally not unjust, extension of parties, renders it proper to use the judgment against those not formally parties."

196. Mr. Freeman speaking of judgments *in rem*, says that their distinguishing characteristic "is, that wherever their obligation is recognized and enforced as against any person, it is equally recognized and enforced as against all persons. It seems to us that the true definition of a judgment *in rem* is, that it is an adjudication against some person or thing, or upon the *status* of some subject-matter, which, wherever and whenever binding upon any person, is equally binding upon all persons. . . . As a judgment, which is strictly *in rem* binds all persons, whether named as parties therein, or in any anterior part of the record or proceedings, or not, it must follow that the proceedings must be such as may indicate to all persons that their interest in the subject-matter is, or may be imperiled, and that they may appear at some time and place for the purpose of making known and protecting their interests; for as against claimants having no notice of the proceeding and no opportunity to be heard, it is not judicial in its character, and whatever may be determined against them is not entitled to respect as a judgment. We therefore suggest that a judgment is *in rem* whenever the process and proceedings are such as to warn all persons that the court may render judgment affecting certain property and their interests therein, and that they must, at or within a time specified, appear before the court if they wish to protect those interests from judicial condemnation. The fact that, under the mode of serving process provided by law, some claimant or even all claimants of the property do not receive actual notice of the proceeding will not prevent the judgment from operating *in rem*, if the mode adopted was reasonable under the circumstances, and calculated to give

Universally binding effect of judgments *in rem* is based on a notice of proceedings to all persons.

notice to the claimants, and the process was such as that the claimants, had it been seen by them, should have known therefrom that their interests were or might be imperiled, and that they might be heard for the preservation of such interests."² This observation was quoted in *Windsor v. McVeigh*,³ the Supreme Court further observing that the mere seizure of property does not give jurisdiction. In that case as well as in the earlier case of *Earle v. McVeigh*,⁴ in which also a notice was held to be necessary to impart validity to proceedings *in rem*, a public notice had actually been given, and jurisdiction was held to be lost on the ground that the claimant was not allowed to appear. The United States Supreme Court has recently taken the same view in *Hassall v. Wilcox*.⁵

The necessity of some notice has, of late, been insisted on by almost every judge who has judicially referred to the matter. As early as 1839, Mr. Justice Story in *Bradstreet v. Neptune Ins. Co.*,⁶ said: "If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice, it ought to have no binding obligation upon the rights or property of the subjects of other nations, for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem*, that some specific offence is charged for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification, or monition, acting *in rem*, or attaching to the thing, so that the parties in interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon *ex parte* statements, without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs." Relying on that observation, Mr. Justice Hall in *Woodruff v.*

Fr. Jud. 1052.
² 93 U. S. 274.
⁴ 91 U. S. 503.

³ 9 S. C. R.
⁵ 3 Sum. 607.

*Taylor*⁷ said : “ In every court and in all countries, where judgments are respected, notice of some kind is given. It is just as essential to the validity of a judgment *in rem*, that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property, where no notice actual or constructive is given, whatever else it might be called, would not entitle it to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court.”

Even the seizure of the thing to which the proceedings *in rem* relate, though bringing the thing within the custody of the court, does not dispense with the necessity of giving an opportunity to all the persons concerned to attend and defend their rights and interests in that thing. The theory of the law is that all the property is in the possession of its owner in person or by agent, and that its seizure will, therefore, operate to impart notice to him. “ Where notice is thus given,” says Mr. Herman, “ the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognised and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question, after opportunity has been afforded to its owners and parties interested to appear and be heard upon the charges. To this end, some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.”⁸

Mr. Vanfleet⁹ appears to think that no notice is required in such cases except that involved in the seizure itself, and in support of that view refers to the practice in the proceedings relating to the appointment of administrators, in which, except by legislation in a few States, no notice is required. Even in such cases, however, a notice is required in this coun-

⁷ 20 Vt. 78.
⁸ Herm. Comm. 344.

⁹ Law. Col. Att. 300.

try. The cases relating to the proceedings of Prize Courts relied on by him¹⁰ only show that a notice to the adverse claimants or to any particular persons is not required. "But," says Mr. Wells, "we must not suppose that because there needs no personal notice to any one, notice may be altogether dispensed with without judicial impropriety, for not specific parties, indeed, but all parties interested are to have opportunity, so far as conveniently may be, to come in and present the merits of their claims resting on the property."¹¹ Notwithstanding certain *dicta*, there appears to be no sufficient authority, however, for holding that the issue of the notice is necessary in order to confer or complete the jurisdiction, at least to a greater extent than in suits *in*

In *Monroe v. Douglas*,¹² it was held that the local regulations and laws of the country in which the court proceeds, must determine what service of process, or what form of notice shall suffice to give to the defenders an opportunity of being heard in their defence, and that the sufficiency of the notice or opportunity is not open to examination in the Court where the foreign judgment *in rem* is produced. Similarly, Marshall, C. J., in *The Mary*¹³ said: "When the proceedings are *in rem* notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing. What this notice shall be, or what opportunity shall be given to appear, must be regulated wholly by the local law where the proceeding takes place." If that law be pursued, the requirement of notice to the party is fulfilled. In England, in Admiralty actions *in rem*, service of a writ of summons or warrant against ship, freight or cargo on board, is to be effected by nailing or affixing the original writ or warrant for a short time on the mast of the vessel, and on taking off the process, leaving a true copy of it nailed or fixed in its place.

197. The same notion of all the persons being parties to proceedings resulting in a judgment *in rem*, by virtue of a constructive notice given to them, runs through the remarks even of judges who have taken a view, otherwise very limited of such judgments. Thus it was said in *Cross v. Armstrong*¹⁴ that "a proceeding brought to deter-

¹⁰ E. G. Feltz, Pinson & Levy 9 Tenn. 206.
¹¹ Wells Res. Jud. 707.
¹² 4 Sandf. Ch. 182.

¹³ 9 Cranch, 126.
¹⁴ 44 Ohio, 624.

mine the status of the thing itself, the particular thing, and which is confined to the subject-matter *in specie*, is *in rem*, the judgment being intended to determine the state or condition, and *ipso facto*, to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service and making proclamation, the court is authorized to decide upon it, without other notice to persons, all the world being parties; while in the latter, in order to give the Court power to adjudicate, there must be service upon those whose rights are sought to be affected." So also in *Freeman v. Alderson*,¹⁵ it was said that "actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, and except in cases arising during war, for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which, by operation of law, it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case." Chief Justice Marshall in *Mankin v. Chandler and Co.*,¹⁶ said: "I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself by the service of the process, and making proclamation, authorizes the court to decide upon it, without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties. The rule is one of convenience and of necessity. In cases to which it applies, it would often be impossible to ascertain the person whose property is proceeded against, and it is presumable that the person whose property is seized is either himself attentive to it, or has placed it in the care of some person who has the power, and whose duty it is to represent him and assert his claim. Such claim may be asserted, but the jurisdiction of the court does not depend on its assertion. The claimant is a party whether he speaks or is silent, whether he asserts his claim or abandons it."

198. This description, however, as pointed out by Freeman places, "too much stress on the fact that the judgment operates should be taken into possession on or by the service of process, and ignore the large class of cases in which, instead of proceeding against anything, courts adjudicate upon the *status* of persons and obtain their authority to do so by a service of their process, which whether actual or constructive is still in its nature personal."¹⁷ The same objection may be urged against the description given of such a judgment by the Supreme Court of Vermont in *Woodruff v. Taylor*,¹⁸ in which Hall, J., said: "A judgment *in rem* I understand to be an adjudication pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this: that the latter judgment is in form, as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. . . . A judgment *in rem* is founded on a proceeding instituted not against the person as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be." The description given by Mr. Smith in his notes on the *Duchess of Kingston's case*¹⁹ is more complete however. He says: "A judgment *in rem* I conceive to be an adjudication pronounced (as indeed its name denotes) upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication being a most solemn declaration from the proper and accredited quarter, that the *status* of the thing adjudicated upon is as declared, concludes all persons from saying that the *status* of the thing adjudicated upon was not such as declared by the adjudication."²⁰ . . . The universal effect of a judgment *in rem* depends on this principle, *viz.*, that it is a solemn declaration, proceeding from an accre-

¹⁷ Fr. Jud. 1030.

¹⁸ 20 Vt. 65.

¹⁹ 11 Sm. L. C. 809, (4th Ed.)

²⁰ *Vide*, Reg. v. The inhabitants of
4 E. and B. 780.

Simpson v. Pogo, 29 L. J. (Ch.)

B. v. . . . on appeal, 32 L. J. (Ch. 2)

Castrique v. Imrie, L. R. 4 H. L. 414.

dited quarter concerning the *status* of the thing adjudicated upon; which very declaration operates accordingly upon the *status* of the thing adjudicated upon, and, *ipso facto*, renders it such as it is thereby declared to be. Thus a condemnation of goods in the Exchequer not merely declares the goods to be liable to forfeiture, but accomplishes the forfeiture accordingly. A sentence in the Prize Court not merely declares the vessel prize, but vests it in the captors. Now, when the *status* of the thing is thus altered, it seems to follow, as a necessary consequence, that the sentence altering it must conclude all the world; for how vain would it be to try an issue, whether the thing be or be not as decreed, when the decree has already not only declared, but rendered it such! To this point tend the observations of the court in *Scott v. Shearman*,²¹ where the judgment *in rem* is held to be conclusive in the action, 'because the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation, it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner.' This must be Lord Coke's meaning, where he states in 1 Inst. 352 *b*, that 'where the record of the estoppel doth run to the disability or legitimation of the person, there all strangers shall take benefit of that record, as *outlawrie*, *excommunication*, *profession*, *attainder*, of *præmunire*, &c., *felonie*, &c., *bastardie*, *muliertie*, and shall conclude the parties, though they be strangers to the record. In all these cases, it will be observed, the record operates upon the status of the individual. Thus judgment of *outlawrie* not merely declares the party an outlaw but renders him so, and is, therefore, a judgment *in rem*, and resembles the act of the Ecclesiastical Court depriving a man of his preferment or conferring on him the new character of an administrator. Now, if this be the principle, it seems impossible to say that where the *status* of the thing is actually operated on, that operation shall be of less effect because some other court, had it been called upon, might have produced a similar one." Mr. Freeman after observing that this is perhaps the most correct as well as the most concise definition any where given of a judgment *in rem*,²² says in criticism of it:

“ When we undertake to say that a judgment *in rem* is necessarily an adjudication upon the status of some particular subject-matter, it seems to us that we either overlook the only class of judgments to which the term *in rem*, ought ever to have been applied, or else we give to the word status an unusual and unauthorized signification. Laws exist under which property is responsible for damages done by it, for taxes imposed upon it, or for expenses incurred in its repairs and management. These same laws often authorize the obligation by them imposed upon the property, to be enforced by proceedings in which the property is the defendant, and in which no service of process is required, except upon such property. The judgment resulting from such a proceeding is *in rem*, and satisfaction thereof is produced by an execution authorizing the sale of the property. The sale acts upon the property, and in so acting necessarily affects all claimants thereto. But the judgment does not affect the status of the property, except in the same sense that a judgment against A. B for a sum of money affects his status. In the one case it is settled that an obligation rests upon certain property; in the other, it is settled that a similar obligation rests on a certain person. Each judgment adjudicates upon a status, so far as it establishes that the defendant is in the state or condition of being accountable to the plaintiff for a sum of money. Neither judgment establishes any status different from that established by the other. Therefore a judgment against a brute, a tract of land, or a vessel, for a sum of money, to be satisfied by execution against such brute, land, or vessel, though clearly *in rem*, no more determines a status than though the defendant were a person.,”²⁵

199. Mr. Smith's definition is sharply criticized, in *Yarakulamma v. Naramma*²⁶ by Phillips and Holloway, JJ., who said: “ The first objection to the definition is that status is a term at least as ambiguous as that which the author seeks to define. If it is intended that the decision must be upon the whole aggregate of rights and obligations attaching to the subject-matter of the adjudication, there probably never was such a

²⁵ FR. JUD. 1050.

²⁶ 11 M. H. C. B. 200.

judgment. The word, too, has an unfortunate ambiguity, seeing that the object-matter of such adjudication is generally a thing, and the right declared a part of the status of some person. Moreover, the words 'accredited quarter' can only mean a tribunal invested with the power of so declaring status that all persons shall be debarred from disputing the declaration. This really amounts to no more than saying that, whenever a tribunal has the power by its decision of so declaring, the declaration shall bind all persons. It is really no definition at all. It leaves in as thick darkness as before what are the tribunals and what the questions susceptible of their operation. We have only further to remark upon the words 'as its name indeed denotes.' It is impossible not to suspect that the learned author supposed '*in rem*' to mean 'upon the thing' or 'against a thing,' and that he was very naturally misled into this opinion by the words really having that meaning when applied to certain modes of procedure in the Courts of Admiralty and Exchequer. . . . The second passage is not less inadequate. The words 'which very declaration operates accordingly upon the status of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be,' really afford no instruction. The effect of the judgment of every competent court is to render the person or thing that which it declares him or it to be. The difference between the decree *in rem* and that *inter partes*, is that the former renders it so as against those not formally parties to the proceeding, while the latter has that effect only as between the parties to the particular suit. As to the argument from the absurdity of trying an issue when the decree has rendered it such as is declared, it is necessary to observe that the same fallacy lurks here. The only mode in which it renders it such as the Court declares it, is by giving to this particular sort of decree a scope greater than that given to an ordinary *res judicata*. The argument in its present condition is really none. This was not the case in *Scott v. Shearman*²⁵ from which its substance is taken. Before using it, Blackstone, J., had shown that, in the proper understanding of the powers of the Court of Exchequer, the plaintiff was really a party, had an opportunity which he neglected of

putting in his claim, and was for ever barred by his laches from questioning either collaterally or directly, the decision given."

This criticism was not altogether approved of by a Full Bench of the Calcutta High Court in *Kanhya Loll v. Radha Churn*,²⁶ and Sir Barnes Peacock in delivering the judgment of the Court, after observing that Mr. Smith's definition was not accurate, said: "I cannot concur in the whole of Mr. Justice Holloway's reasoning Mr. Justice Holloway has not, I think, attached sufficient importance to the words used by Mr. Smith, 'which very declaration operates upon the status of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be.' This would not be the effect of a finding upon a question of status in a suit *in personam*, though it might have been so under the Civil Law in a suit *in rem*, not for the purpose of asserting a right against a particular person, but for the purpose of adjudicating upon the status. I do not agree with Mr. Justice Holloway in his remark²⁷ at page 281 of his judgment 'that the effect of a decree of every competent court is to render the person or thing that which it declares him or it to be.' A decree, according to the nature of it, may prevent particular persons or the subjects of a particular Government, or it may be the whole world, from averring to the contrary. According to the Civil Law, a suit in which a claim of ownership was made against all other persons was an action *in rem*, and the judgment pronounced in such action was a judgment *in rem* and binding upon all persons whom the court was competent to bind; but if the claim was made against a particular person or persons, it was an action *in personam*, and the decree was a decree *in personam*, and binding only upon the particular person or persons against whom the claim was preferred or persons who were privies to them. . . . Decrees by courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a court of competent jurisdiction decrees a divorce, or sets aside a marriage between Mahomedans or Hindoos, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree,

the parties ceased to be husband and wife. This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit as Mr. Justice Holloway appears to think; for, if they had notice, they could not intervene or interfere in the suit, but upon the principle that, when a marriage is set aside by a court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons. A valid marriage causes the relationship of husband and wife, not only as between the parties to it, but also as respects all the world: a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Mahomedan, or by the act of a court competent to dissolve it, causes that relationship to cease as regards all the world. The record of a decree in a suit for divorce or of any other decree is evidence that such a decree was pronounced (see cases referred to in Smith's Leading Cases, Vol. II, p. 439³³); and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive or even *prima facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a decree between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So, if a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity, as, for instance, in the case of a Mahomedan, that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters."

In *Castrique v. Imrie*,³⁴ Cockburn, C. J., defined a judgment *in rem* as a "judgment determining the status of a chattel with reference to property, or vesting the pro-

³³ II Sm. L. C

perty at once in the claimant, as a condemnation of the Court of Exchequer in a revenue cause vests the property in the Crown, or a sentence of a Court of Admiralty in a matter of prize vests the property in the captors ;"—and Mr. Pigott says that though difficult to understand, that is the most accurate of all the definitions of the term. But as observed by Mr. Freeman, "Judgments *in rem*, it is well known, are not, as the name implies, confined to adjudications against things. They are rendered in many instances where the prior proceedings are entirely *in personam*, as in cases establishing or dissolving marriages."⁵⁰

200. These definitions, or rather descriptions, are a mere statement of the effect of a judgment *in rem*. They do not indicate any principle upon which to rest them so as to determine what cases fall within it, do not furnish any test the application whereof to a judgment may discover whether it is a judgment *in rem*. There is a considerable conflict, as may have been already noticed, in regard to the classes of judgments that are *in rem*. The difficulty is further enhanced by the Legislatures and courts of different countries having in some cases given such effect to certain peculiar sorts of judgments, that are not known elsewhere, and cannot be expected to receive that effect from courts of other countries. In Everest and Strode's work on the law of Estoppel,⁵¹ the following classes of judgments are treated as those *in rem*, though some doubt is expressed as to whether the last four are not judgments *in personam* merely:—

1. Judgments of condemnation of property forfeited, (a) by the Court of Exchequer, and (b) by the Commissioners or Sub-Commissioners of Excise, Inland Revenue, or Customs.
2. Adjudications in the Court of Admiralty on the subject of prize.
3. Judgments in the Divorce Court.
4. Grants of Probate and Administration.
5. Adjudications in Bankruptcy.

6. Sentences of deprivation and expulsion, whether delivered by the spiritual court, a visitor or a college.
7. Judgments of outlawry and declarations of legitimacy.
8. Adjudications of settlement by an order of justices.
9. Judgments and orders made under special statutory powers.
10. Sentences of Courts Martial.
11. Judgments of proceedings by way of *quo warranto*.
12. Convictions in criminal prosecutions and inquisitions.

Mr. Herman speaking of the American Law, says: "Under the term judgment *in rem* are included judgments of Courts of Admiralty relating to a prize or a judgment of condemnation, confiscation or forfeiture, under the revenue or excise laws, and the judgments of all other courts directly upon the personal status or relations of the party, such as marriage, divorce, bastardy, settlement, an adjudication by a competent tribunal of a question of descent or pedigree;⁵² the decisions of a court of Probate, Orphan's Courts, Guardians' Courts, Courts of Ordinary, Surrogates' Courts, Courts-Martial, Ecclesiastical and Spiritual Courts, courts having probate jurisdiction upon the validity of a will.⁵³ The settlement of the accounts of an administrator, executor or guardian,⁵⁴ or of a court having jurisdiction in bankruptcy or insolvency matters, as an order discharging the person or estate of a bankrupt from the obligation of his debts,⁵⁵ estops all parties from disputing the point decreed, whether they were or were not parties to the proceeding in which the decree was made. So a judgment or a decree regarding the legal status or authority of parties.⁵⁶ Thus a decision of the Senate of New Hampshire that a person claiming a seat as senator was duly elected, &c., cannot be questioned by the executive or judicial departments. For they operate precisely like a judgment of condemnation or forfeiture in rendering the person what they pronounce him to be, as the grant of letters, testamentary or administration, the

⁵² Hood v. Hood, 110 Mass. 461.
 Runn v. Smith, 14 How. 401.

⁵³ Tebbets v. Tilton, 24 N. H.
⁵⁴ Very v. McHenry, 29 Me. 21.
⁵⁵ Opinion of Justices, 56 N. H. 570.

Proceedings by creditors against the personal property of their debtor in the hands of third persons, or against debts due to him by such third persons, are treated and deemed entitled to the same consideration.³⁹ Mr. Freeman says: "Proceedings by attachment are not, strictly speaking, *in rem*, and yet they are sometimes so spoken of; and in some respects their effect is more, and in others less, comprehensive than the effect of proceedings *in personam*. Thus by the seizure of the property, as where moneys are garnished, jurisdiction is acquired over the fund, so that orders may be made for its distribution or payment, which will bind the owner, though he has not appeared nor been personally summoned in the case, provided such owner is in law or in fact a defendant in the action. But the judgment in such action must, in its effect, be restricted to the property before the court, and even as to that property, it is not conclusive upon the title, except as between the parties to the action and those in privity with them."⁴⁰ A judgment in an action of replevin has been held not to be *in rem*.⁴¹

201. Lord Justice Turner in delivering the judgment of their Lordships of the Privy Council in *Katama Natchiar v. Rajah of Shiva-gunga*⁴² said: "That a judgment is not a judgment *in rem*, because in a suit

What judgments were considered to be *in rem* in British India.

³⁹ *Dean v. Chapin*, 22 Mich. 275.

⁴⁰ *Herm. Comm.* 349.

⁴¹ *Pr. Jud.* 1057.

⁴² *Story Const. Laws*, 816.

by A. for the recovery of an estate from B. it has determined an issue raised concerning the status of a particular person or family." So also a decree declaring a *patta* to be a forgery was held not to be a judgment *in rem*.⁴³ In *Kanhya Loll v. Radha Churn*.⁴⁴ Sir Barnes Peacock in delivering the judgment of a Full Bench of Calcutta High Court, said: "I concur with him (Mr. Justice Holloway) entirely in the conclusion at which he arrived, *viz.*, that a decision by a competent court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes*, or more correctly speaking in an action *in personam*, is not a judgment *in rem* or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies. I would go further, and say that a decree in such a case is not, and ought not to be, admissible at all as evidence against strangers. . . . It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question, and the Indian Succession Act, No. X of 1865, Sec. 242, points out expressly the effect which they are to have over property, and the extent to which they are to be conclusive. . . . If a judgment in a suit between A and B that certain property for which the suit was brought belonged to A as the adopted son of C, were a judgment *in rem* and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused. For instance, suppose that a Hindu, one of four brothers, should be entitled to a large *zamindaree*, yielding an annual profit of two lacs of rupees, and also of a small piece of land in a distant *zamindaree*, and that, upon his death without issue and without leaving a widow, surviving brothers as his heirs should enter into possession and sell the small piece of land, and that afterwards a person claiming to be the adopted son of the deceased brother should sue the purchaser in the Munsif's Court to recover the land so sold upon the ground that, he being the heir by adoption, the brothers of the

⁴³ *Gangadhar v. Masoondary*, B. L. R., Sup. Vol. P. B. 673. | ⁴⁴ VII W. R. 718.

deceased had no title to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant might succeed without any collusion in establishing the alleged adoption and recover the land. Moreover, the purchaser might not have the means to enable him to appeal. Now, if this judgment were a judgment *in rem* and conclusive against the brothers as to the status created by the alleged adoption in a suit brought against them for the *zamindari*, they would have no means of defending their possession, however clearly they might be able to prove that there was no foundation whatever in support of the claim of adoption. Assume that the purchaser in the Munsif's Court was perfectly honest and *bonâ fide*, and that the Munsif's Court was one of competent jurisdiction, having regard to the situation and value of the property, and held that the judgment was a decree *in rem*, and there would be no means of getting rid of the decree of the Munsif's Court, and thus the decree of the Munsif in a suit for land within his competency would finally and conclusively determine the title to the *zamindari* against persons who might never even have heard of the suit in the Munsif's Court whilst it was going on. There is no ground upon which it could be held that the decree in such a case would be admissible merely as *prima facie* evidence. It must either be conclusive as a judgment *in rem*, or fall within the general rule, and not be admissible at all upon the question of adoption. If it could be admitted as even *prima facie* evidence, it might work the greatest injustice by throwing the burthen on to the defendants, and compelling them to prove a negative, *viz.*, that the claimant had not been adopted, and this probably after many years from the time at which the adoption is alleged to have been made. The fact is that the Munsif, in such a case, would be competent to try the right of the parties to the land claimed, and incidentally to determine the question of adoption. But he would have no power to entertain a suit merely for the purpose of determining a question of status."

There are few judgments truly *in rem* in this country. In *Jogendra Deb v. Funindro Deb*,⁴⁵ Sir James Colville, in

⁴⁵ XIV M. I. A. 367.

delivering the judgment of their Lordships of the Privy Council observed that: "It appears to them to be extremely doubtful, whether there exists in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving, what can be called technically a judgment *in rem*." Sir Barnes Peacock in the judgment of the Full Bench in *Kanhya Loll v. Radha Churn*,⁴⁶ after observing that there are no suits in this country, with the exception of those in the High Court in the exercise of admiralty and vice-admiralty jurisdiction, which answer to the actions *in rem* of the civil law, and none corresponding with the *actions prejudiciales*, said: "It is quite clear that there are no judgments *in rem* in the mofussil courts, and that, as a general rule, decrees in those courts are not admissible against strangers either as conclusive or even as *prima facie* evidence, to prove the truth of any matter directly or indirectly determined by the judgment or by the finding upon any issue raised in the suit whether relating to status, property, or any other matter."

202. The Indian Legislature, for the sake of simplicity, and in order to avoid the diffi-

judgments *in rem* in
British India.

ments *in rem*, adopted the statement of the law by Sir Barnes Peacock, and embodied in Section 41 of the Indian Evidence Act a clear rule, which, slightly amended by Act XVIII of 1872, is now the law of British India relating to judgments *in rem*.⁴⁷ The section, as amended, enacts:

"A final judgment, order or decree, of a competent court, in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character or to be entitled to any specific thing, not as against any specified person but absolutely, is conclusive proof that any legal character which it confers, accrued at the time when such judgment, order, or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the

⁴⁶ VII W. R. 338.

⁴⁷ *Ibid.*, Select Committee's Report on the Indian Evidence Bill.

time when such judgment, order or decree declares it to have accrued to that person ;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease ;

and that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."

The section does not expressly mention courts-martial; but native Courts-Martial are included in the operation of the Act. Under the section a judgment may, however, be conclusive in a criminal proceeding, though that point is not yet quite free from doubt in England. The Judges had incidentally expressed an opinion against it in the *Duchess of Kingston's case*, "urging, first, that it would be contrary to public policy that the temporal Courts, in the investigation of a criminal charge, should be bound by a decision, perhaps of an Ecclesiastical Judge, addressed only to the conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision were conclusive in favor of a prisoner, it would be equally binding against him; and consequently his life, liberty, property, and fame might depend upon the judgment of a court which had no organs to discover whether he had committed a crime or not."¹⁸ The decision in *R. v. Buttery*,¹⁹ is sometimes cited as being in support of that view, but, as pointed out by Mr. Taylor, it lends little, if any, support to it; and Mr. Smith, in his notes on the *Duchess of Kingston's case*, says that "it is difficult to see how a decree *in rem*, which operates upon the status of the individual and renders the fact what the court adjudicates it to be, it is difficult to see how such a sentence can be otherwise than conclusive." In *R. v. Graddon*,²⁰ a sentence of expulsion from a college was held conclusive in answer to an indictment for assault.

203. Sec. 41 of the Indian Evidence Act not only enumerates the different sorts of judgments *in rem*, but also enacts the Effect allowed to judgments *in rem*.

¹⁸ T. y. 2v. 1435.
¹⁹ B. and R. 342.

²⁰ 11 Sm. L. C. 829

effect is of a very limited character, and much more so than that allowed to judgments *in rem* in England, and the difference is especially marked in the case of Admiralty decisions which receive a much wider operation in England and the United States.^(a) In British India even those decisions will be conclusive only of the proprietary right of the things adjudged as prizes. Dr. Bigelow in accordance with his broad notions of the operation of the doctrine of *res judicata* in his notes in the eighth edition of Story's Conflict of Laws, says that—"the better rule in the case of domestic judgments and *a fortiori* in the case of foreign judgments, appears to be that the judgment is conclusive of all facts which become under the pleadings or evidence necessary to it, whether presented by direct affirmation and denial or by avoidance."⁵¹ Indeed courts in one or two cases have gone still further, and held foreign judgments *in rem* conclusive of facts not

(a) Thus in *Bolton v. Gladstone*.⁵² Lord Ellenborough said : "It may now as the settled doctrine of an English court of law, that all sentences of foreign courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially."⁵³ It has been held that the sentence of a foreign court of admiralty of competent jurisdiction pronounced *in rem* is conclusive against the whole world, as to the existence of the ground on which the court professes to decide.⁵⁴ "These sentences, like judgments in a court of common law, are always conclusive as to their own existence, and the legal consequences resulting therefrom,"⁵⁵ one of those consequences being that the title of the original owner to the property upon which they operate is completely extinguished or transferred to their sovereign." As to the other judgments *in rem* there has been a greater conflict of opinion. Dr. Story says : "It is not so universally settled that the judgment is conclusive of all the points which are incidentally disposed of by the judgment, or of the facts or allegations upon which it professes to be founded. In this respect different rules are adopted by different States both in Europe and in America. In England such judgments are held conclusive not only *in rem*, but also as to all the points and facts which they professedly or incidentally decide. In some of the American States, the same doctrine prevails. While in the other American States, the judgments are held conclusive, only *in rem*, and may be controverted as to all the incidental grounds and facts on which they profess to be founded."⁵⁶ Speaking of the American rule, Mr. Black says : "It is almost universally held in this country that the sentence of a foreign court of admiralty, proceeding *in rem*, after acquiring jurisdiction, whereby a vessel or cargo is condemned as lawful prize, is conclusive evidence, not only to change the property in the *res*, but also of all the facts upon which the condemnation was founded. Thus, in a subsequent action between the owners and the underwriters, such a sentence is conclusive evidence that the goods so condemned were enemies' property (if that was the ground of condemnation), and therefore that there has been a breach of the warranty of neutrality contained in the policy."⁵⁷ So, in a similar action, the sentence of a foreign admiralty court condemning the insured vessel for a breach of blockade, and specifying that as the ground of condemnation, is conclusive evidence of the fact of such breach of blockade. The same rule holds good in England."⁵⁸

Railroad Co. v. Schulte, 103 U. S. 118.
Wood v. Kellogg, 60 Barb. 617.
Wood v. Jackson, 8 Wend. 9.

⁵¹ *Ibid.*, *Lothian v. Henderson*, 3 Bos. and Pul. 400.

⁵² *Homey v. Irishington*, 7 T. R. 32.
c. Hodgson, 7 Ring. 504.

⁵³ *Horn v. ...*

⁵⁴ *Story Conf. Law*, §17.

Cuculla v. La. Ins. Co., 16 Am. Dec. 199.

⁵⁵ *Bl. Jud.* 977

necessary to the decision where it appeared nevertheless that a clear and precise issue had been joined and decided upon them.”⁵⁹ This view has, however, not been adopted by the courts, who are gradually inclining to the view that has been adopted by the Indian Legislature.

As to the bankruptcy proceedings, it has been expressly enacted by the Bankruptcy Act, 1883⁶⁰, that an order of discharge under that Act is conclusive of the bankruptcy and of the validity of the proceedings.

As to matrimonial proceedings, a decree of the Spiritual Court declaring a marriage void *ab initio* has been held to be conclusive in regard to the status of one of the issue, a pauper, although an order for the removal of others of the issue had been made on the ground of the validity of the marriage.⁶¹ But sentences which do not affect the status of the parties do not operate as judgments *in rem*, thus the dismissal of the wife's petition for judicial separation on the ground of non-proof of acts of adultery by husband, and a sentence for jactitation of marriage which does not affect status are not judgments *in rem*.

Difficult questions have risen most frequently as to the effect of a grant of probate or of administration. As a general rule, the grant actually invests the executor or administrator with the character which it declares to belong to him, and is conclusive against all the world. It cannot be shown in any subsequent proceeding that the testator was mad or that the *will* was forged, for these facts may have been alleged in the court, which granted the probate or administration, in opposition to the grant. In *Arunmoyi Dasi v. Mohendra Nath*,⁶² the grant of letters of administration to a residuary legatee in opposition to the deceased's widow who denied the genuineness as well as the construction placed on the will, was held by a Division Bench of Calcutta High Court not to bar a subsequent suit by her for her share of the estate under the Bengal school of Hindu law. Sir Comer Petheram, C. J., and Ghose, J., after referring to Sec. 59 of the Probate and Administration Act, 1881, and Sec. 41 of the Indian Evidence Act, said: “The question here arises, what is the legal character

⁵⁹ *Bernardi v. Motteaux*, 2 Doug. 574.
Hughes v. Cornelius, 2 How. 232.
⁶⁰ 46, 47 Vic. C. 53 B. 30 (8).

⁶¹ *R. v. Wye*, 7 A. & E. 761.
 1 L. R. XX Cal. 604.

that the Allahabad High Court, in the exercise of its probate jurisdiction, declared that the defendants were entitled to, or conferred upon them? Did it and could it confer upon them any other legal character than what the Probate and Administration Act expressly lays down, *viz.*, the representative title of the grantees as against all debtors, &c., and persons holding property belonging to the deceased? No doubt the Allahabad High Court in determining the question whether the defendants were entitled to letters of administration, as prayed for, had to construe the will, and to consider whether upon a proper construction of that document, the defendants were residuary legatees; but this was only for the purpose of determining the question of representative title as in Sec. 59 mentioned. The question of the construction of the will was but an incidental question which the court had to consider in determining whether the defendants were entitled to letters of administration in respect of the estate of the deceased. It has been held that in a proceeding upon an application for probate of a will, the only question which the court is called upon to determine is whether the will is true or not, and that it is not the province of the court to determine any question of title with reference to the property covered by the will.⁶³

It is quite settled in England, that the grant does not establish the testator's domicile, or any other circumstances not required to be proved for the grant. In *Whicker v. Hume*,⁶⁴ Lord Chelmsford said that the probate of a will "conclusively establishes in all courts, that the will was executed according to the law of the country where the testator was domiciled." As to the point whether the probate was or was not conclusive evidence of the domicile, Lord Cranworth however said: "that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else." Lord Wensleydale added that the "probate of a will in common form is conclusive evidence of the title of the executors to all personal property of which the testator

⁶³ *Behary Lall v. Juggo Mohun*, L. L. R. IV |
(Cal. L.

⁶⁴ 7 H. L. 124.

was capable of disposing." This decision was cited with approval in *Concha v. Concha*,⁶⁵ in which the order granting the probate actually stated that the testator was at the time of the execution of his will and at the time of his death a domiciled Englishman ; and it was contended before the House of Lords, that the said statement was conclusive against all the world. Lord Hershell, with whom the other Lords concurred, said, "that the mere fact that probate of the will was granted is not so conclusive is established beyond all possibility of question by a decision of your Lordships' House But it is said although his (the Probate Judge's) decision would not necessarily have determined that question (of the testator's domicile) had it been delivered in a different form from that which it took, and had the order been in a different form, yet it is conclusive because in this particular case the learned judge affected to determine that point and his determination was recorded in the order. For my part I think it would be impossible to hold that a question of that sort is conclusively determined because the learned judge has expressed his opinion upon a matter of fact when that matter of fact was not essential to his decision. All that is essential to the decision that the plaintiffs were entitled to probate may be taken perhaps to be conclusively determined ; but I do not see how anything more than this can be taken to be conclusively determined. Certainly it would be very strange if, although the finding in the decree as to the testator's domicile could not be appealed from because it was not essential to the decision, nevertheless, it conclusively determined the fact against all the world, upon which the opinion of no tribunal except that of the judge of first instance could be taken."

The same rule appears to be recognised by and acted upon in the American courts. Thus in *Miller v. Foster*,⁶⁶ a grant of probate or of an administration was held to actually invest the executor or administrator with the character which it declared to belong to him. In establishing the testamentary character of an instrument offered for probate as a will, the decree, however, establishes *inter omnes* its genuineness,⁶⁷ but not the capacity of the testa-

⁶⁵ 11 App. Cas. 541.
⁶⁶ 70 Tex. 479.

⁶⁷ *Newman v. Waterman*, 53 Am. Rep. 310.

tor to make it.^{68b} The probate of a will cannot be collaterally avoided on the ground that the will is a forgery, or that the testator made a subsequent will and appointed another executor, or on any other ground.⁶⁹ In *Lawrence v. Englesby*,⁷⁰ an applicant for appointment as administrator alleging that the respondent claimed to have been administrator of the same estate, but that he had not been legally appointed, and was not entitled to the position, and that he was an improper person for it, the defendant replied that he had been appointed by a court of probate, at the request of certain heirs and next-of-kin of the intestate, and that the order of his appointment had not been appealed against; and the Supreme Court held that the plaintiff was concluded by the appointment, and that it could not, in a collateral way, review the correctness or propriety of a decree of a Court of probate acting within its jurisdiction. "Whether the defendant," says Dr. Bigelow, "was a proper person to be appointed administrator and whether a request by only a part of the next-of-kin was sufficient to warrant a grant of letters, were questions properly arising before the court; and if the petitioner felt aggrieved, he should have appealed."⁷¹

204. The first essential of the validity of judgments *in rem*, as of all judgments, is that they should have been pronounced by a court of competent jurisdiction. In the case of judgments relating to things, the presence of the things within the limits of the court's jurisdiction is generally considered necessary to give jurisdiction. If a decision on the *status* of a thing be pronounced, when the court has not the thing in possession, such a sentence will manifestly be a nullity; but constructive possession is sufficient to give jurisdiction. Mr. Herman says: "In order to render a judgment, sentence, or decree *in rem*, the right arises from an actual or constructive possession of the *res*, acquired or held in such a way as to make it a fit subject for adjudication, and when this has been once

^b In *Brigham v. Fayerweather*,⁶⁸ there was a suit to set aside a mortgage made by B. on the ground that she was of unsound mind when she executed it. The defendants to show her sanity offered in evidence the decree of the Probate Court allowing a will made by her, and also other evidence that her mental capacity was no less when she executed the will; but it was held that the decree was not even admissible evidence upon the

⁶⁸ *Brigham v. Fayerweather*, 3 N. E. R. 265.

⁶⁹ *Moore v. Tanner's Adm'r*, 27 Am. Dec.
Vanderpool v. Van Valkenburgh, 6 N. Y.

24 Vt. 42.
 Hug.

acquired by a duly authorized tribunal, no other is allowed to interfere with the tribunal which first obtains jurisdiction, until the first tribunal has fully adjudicated all matters connected therewith.⁷² In *Gay, Hardie, & Co. v. Brierfield C. & I. Co.*,⁷³ Coleman, J., said: "The principle is universally acknowledged, that when two courts have concurrent jurisdiction, that which first takes cognizance of the case, has the right to retain it, to the exclusion of the other; that if a trust estate is being administered by a court of competent jurisdiction, or where property is in *gremio legis*, of a court of rightful jurisdiction, no other court can interfere, and wrest from it the possession and jurisdiction first obtained. As was said in *Peck v. Jenness*,⁷⁴ 'Where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, has once attached, that right cannot be arrested or taken away by proceedings in any other court.' . . . The rule here declared has been adopted and followed invariably by all subsequent decisions. Many of them, however, have given it a very broad and extensive significance, while others have limited its meaning, and consequently the application of the principle has not in all respects been uniform. In the case of *Vaughan v. Northup*,⁷⁵ it was held, that an administrator appointed in one State must account for the assets received by him according to the law of his appointment, and could not be sued in the court of another State for the assets received and held by him in his official capacity. *Williams v. Benedict*,⁷⁶ was a case where an estate had been declared insolvent, and the assets were being administered in the State Courts for the benefit of all the creditors. It was held, that the property was in *gremio legis*, and not subject to levy by the United States Marshal at the suit of a creditor suing in the Federal Courts. In the case of *Peate v. Phipps*,⁷⁷ commissioners had been appointed to settle up and distribute the assets of an insolvent bank, and it was held that no other court had jurisdiction to interfere at the suit of creditors, and apply the assets to the payment of their claims; that it was the duty of all creditors to apply to the State Court which had taken jurisdiction of the settlement and distribution of the assets. The principles declared in this decision are re-affirmed in *Barton v. Barbour*.⁷⁸ In the case of *Taylor v. Carryl*,⁷⁹ a writ of attachment issued by a State Court had been levied upon a vessel,

Herm. Comm. 357.
33 Am. St. Rep. 122.
7 How. 624.
15 Pet. 1.

72 4 How. 107.
73 14 How. 372.
74 101 U. S. 126.
75 20 How. 583.

and the vessel replevied. Suit was afterwards begun in a Court of Admiralty to enforce seamen's wages, and the writ placed in the hands of a Marshal. It was held that the State Court having possession first, the possession could not be interfered with by the Admiralty Court, citing *Hagan v. Lucas*; ⁸⁰ In this case there was a dissenting opinion by Taney, C. J., who recognized the general principle, but held that because of the equities of the claimants (the lien of seamen's wages), of which alone the Admiralty Court had jurisdiction, the jurisdiction of the Admiralty Court did not violate the rule. The rule declared by Taney, C. J., seems to be the law in this State, in which it has been declared that although the Probate and Chancery Courts may have concurrent jurisdiction, yet if there are peculiar equities of which the Probate Court cannot take jurisdiction, then the Chancery Court may proceed, without a violation of the rule.⁸¹ The case of *Freeman v. Howe*,⁸² after re-affirming the principle in *Peck v. Jenness*; declared that property in the hands of the United States Marshal, seized by him upon a writ from the Circuit Court of the United States, could not be replevied or interfered with by a writ from a State Court, and further held that the principle did not depend upon the rights of the parties involved, and that it applied to persons who were not parties to the original or first suit. . . . The Chancery Court of Louisville, Kentucky, by a decree directed its Marshal to deliver the church (the matter of controversy) to Watson and others. While this suit was pending, and the church was in the possession of the Marshal of the Chancery Court, Jones and others filed a bill in the United States Court to get possession of the church, and to enjoin the Marshal from delivering the church to Watson, and to enjoin Watson from taking possession of the church. In *Watson v. Jones*,⁸³ Miller, J., said: "The decisions of this court in the cases of *Taylor v. Carryl*,⁸⁴ *Freeman v. Howe*,⁸⁵ and *Buck v. Colbath*,⁸⁶ are conclusive that the Marshal of the Chancery Court cannot be displaced as to the actual possession of the property, because that might lead to a personal conflict between the officers of the courts for the possession; and the cases of *Diggs v. Wolcott*,⁸⁷ and *Peck v. Jenness*, are conclusive

⁸⁰ 10 Pet. 400.⁸¹ *Gould v. Hayes*, 19 Ala. 448.*Wilkinson v. Stuart*.

74 Ala. 190.

⁸² 24 How. 430.⁸³ 18 Wall. 713.⁸⁴ 24 How. 430.⁸⁵ 8 Wall. 314.⁸⁶ 4 Cranch.

conceded. The real question before the court for decision, and which was decided, was, whether the State Court or the Federal Court first had jurisdiction; and it was held that by the filing of the petition, and the proceeding in the State Court for the foreclosure of the mortgage, that court was the first to assume and exercise jurisdiction; and the court further held that the decree ascertaining and fixing the amount of the indebtedness of the mortgagor to the mortgagee was conclusive and binding upon other creditors of the mortgagor, so far as it fixed a liability of the mortgagor and its amount to the mortgagee. The *Holladay case*,⁸⁹ was a bill in equity in the Federal Court by Hickox against Holladay to set aside a fraudulent conveyance made by Ben Holladay to his brother Joseph Holladay. After disposing of other questions which arose in the case, the opinion proceeds as follows: 'The answer of Holladay also contains an allegation in bar of this suit, to the effect that on November 7th, 1883, and prior to the commencement thereof, the Circuit Court of the State for the county of Multnomah, in a suit then pending therein between Ben Holladay and Joseph Holladay, appointed a receiver of all the property mentioned in the bill herein, who is now in possession of the same as such receiver, which suit is still pending in said court. In support of this defence, counsel submit the proposition that while the property is in the hands of a receiver appointed by a court, no other court can acquire or take jurisdiction of a suit concerning such property, and cites a number of authorities in

support thereof; but the proposition is altogether too broad, and is unsupported by the authorities cited. The receiver has no right in the property, but only the possession thereof. So long as that is not disturbed or questioned, parties may litigate in the same court or elsewhere questions concerning the ultimate right and title to the property; and, therefore, notwithstanding the case of *Holladay*, and the possession of the receiver therein, this court may take jurisdiction of a suit to set aside or postpone an alleged fraudulent conveyance of any of this property by Ben Holladay which hinders or delays the plaintiff in the enforcement of his judgment against said Holladay. In *Buck v. Colbath*,⁹⁰ this question is examined by Mr. Justice Miller, and the conclusion reached that the rule among courts of concurrent jurisdiction, that the one which first obtains jurisdiction of a case has the exclusive right to decide every question arising therein, is subject to limitations. See also *Andrews v. Smith*.⁹¹ In the case of *Ball v. Tompkins*,⁹² after stating the general principle, that 'this court cannot invade the possession of the subject-matter of controversy already taken by the State Court having concurrent authority, and in the exercise thereof; for the rule is here as elsewhere, that the court which first acquired possession of the subject will retain it, and the power to dispose of it by its own adjudication, citing *Williams v. Benedict*,⁹³ *Freeman v. Howe*,⁹⁴ *Yonley v. Lavender*,⁹⁵' proceeds as follows: 'And this brings us to the pivotal question in the present inquiry: What is the nature and character of the possession of the State or Federal Court which excludes the exercise of authority over the subject or thing by the other? From the authorities on this subject (which in the Circuit Courts are not altogether harmonious), and from the reasons for the rule, I apprehend it to be, substantially, that the possession contemplated as sufficient to make it exclusive is that which the court by its process, or some equivalent mode, has, either for the direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody something. That thing may be corporeal or incorporeal, a substance, or a mere right. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds from the beginning to the judgment without the court's having taken actual dominion of any thing;

⁹⁰ 3 Wall. 334.

⁹¹ 19 Blatchf. 100, 5 Fed. Rep. 333

⁹² 41 Fed. Rep. 404.

⁹³ 8 How. 107.

⁹⁴ 24 How. 450.

⁹⁵ 21 Wall. 276.

but there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession. The pendency of a controversy in a suit in a State or federal Court is no bar to a suit in the other court involving the same controversy⁹⁶ : and each will proceed in its own course to a judgment establishing the right. The control which each court has over its own processes has always been found adequate to prevent mischief from diverse judgments in the several jurisdictions ; but, in proceeding on its way, whenever either court finds that the other has already taken actual dominion over some subject, it will let the thing alone, so long as that dominion is retained, and proceed, if there be enough material besides to support the exercise of its jurisdiction, and the pursuit may reach fruit. If not, it will stop. . . . No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized, even by the court appointing the receiver, and is not open to revision by it, if the court rendering the decision had jurisdiction of the subject-matter and the parties. The manner in which it shall be paid, and the adjustment of the equities between all persons having claims on the property and effects in the hands of a receiver, must be under the control of the court having custody through its receiver ; but this does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim⁹⁷ ; . . . Courts accord to suitors and litigants all necessary latitude ; and they are not restricted to any one forum for the adjudication of any question or right, provided only that such adjudications are not upon questions pending in another concurrent court which had prior jurisdiction, and provided that its writs or process shall not hinder the performance of any lawful mandate of such concurrent court, or interfere with or disturb the possession of any subject-matter then in *gremio legis*. Possibly plaintiffs might sue the Brierfield Coal and Iron Company in a court of law, and recover judgment, and have execution as in the case of the steamboat *Daniel Kaine*,⁹⁸ or file a bill on the judgment as in the *Holladay case*, or, when necessary to fix and establish a lien, they may proceed for this purpose as in the case of *Heidritter v. Elizabeth Oil Cloth Co.*,⁹⁹ and in neither instance trans-

Stanton v. Embrey, 93 U. S. 548.
Dillingham v. Russell, 16 Am. St. Rep. 713.

⁹⁶ 35 Fed. Rep.
⁹⁷ 112 U. S. 294

gress the domain of the United States court. Any attempt to enforce the judgment or lien thus established, by interfering with the possession or subject-matter under the control of the concurrent court, would be nugatory." Stone, C.J., expressed concurrence with that opinion and said: "When one court has acquired and is in jurisdiction over a subject-matter *inter partes*, no other court of simply concurrent power can take jurisdiction of that same subject-matter between the same parties; and the rule is much more inflexible when, under some color or process of its own, the court first acquiring jurisdiction has obtained possession of the *res* which is the subject of the suit. When this is the case, the thing is in the custody of the court, and until disposed of by final judgment or decree, that possession cannot be interfered with by any court of concurrent jurisdiction, whether its powers be invoked by a party to the first suit or by a stranger to the litigation." He then expressed his full concurrence with the statements of Justice Coleman as to the extent of the rule, and proceeded thus: "The reason of the rule exists in the prevention of collisions between courts of concurrent jurisdiction. Neither the reason nor the rule finds any field of operation, when the proceedings in one jurisdiction do not in any manner interfere with those in the other. . . . Under the suit by the trustee in the United States Court, all the property of the Brierfield Coal and Iron Company was placed in the hands of a trustee or receiver, to be administered for the purposes specified in the mortgage, and the further assurance. Until that court finishes the litigation there pending, and relinquishes the possession of the property, no other court can disturb that possession, or interfere with the untrammelled adjudication of the issues raised in that suit; and the decision or decree rendered, or to be rendered in that suit, will bind all the parties to it and their privies, unless it is reversed by a court having authority to revise its judgment."¹⁰⁰ In other words, while the proceedings of the court are *in fieri*, and the corporation's effects are in the hands of that court's trustee or receiver, no other court of concurrent jurisdiction, and no suitor in such court, can disturb or interfere with such possession, or with that court's untrammelled adjudication of the questions before it. The rule has no greater extent than this: "The learned Editors of the American State Reports say: "Where two

¹⁰⁰ Stout v. Lye, 103 U. S. 66.

¹ 3 Lead. Cas. in equity, part. 2, 1409

² 33 Am. St. Rep. 140.

JURISDICTION OF PRIZE AND ADMIRALTY

courts possess equal and concurrent jurisdiction of a matter, that court in which jurisdiction first attaches will retain the case for final disposition :³ This rule was applied in regard to Federal and State Courts in *Hines v. Rawson*,⁴ *Sharon v. Sharon*.⁵ When once the State courts have acquired jurisdiction of a question, the Federal judiciary has no control over it until the State has finally exhausted its judicial power by a final decision in its highest tribunal :⁶ on the other hand, a State court has no jurisdiction of an action to foreclose a mortgage where the premises were, at the commencement of the action, in the hands of a receiver appointed by a federal court having jurisdiction to make such appointment.”⁷

Mr. Herman says that jurisdiction may depend upon the state of the *res* on which the decree was intended to operate, if, for instance, a prize court should be induced to condemn as prize of war a vessel which was never captured, such a condemnation as that would certainly not transfer any property ; so, if the prize courts should lose possession as by recapture, voluntary discharge or escape, the prize courts of the captor would thereby lose jurisdiction.”⁸ The correctness of the last proposition has often been denied. In *The Rio Grande*,⁹ the United States Supreme Court said : “ We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by order of the court, and brought within its control, the jurisdiction was complete. A subsequent improper removal cannot defeat such jurisdiction. ’

The court of the sovereign of the captor is the only competent tribunal to decide on the validity of captures. Prize courts cannot adjudicate on a prize lying in a foreign port or out of the jurisdiction of the captor or his ally. And if they proceed to pass upon such a question when the subject-matter of their sentence is within the territory of a neutral power, such sentence is void, transfers no rights, and may be disregarded by the Common law courts.¹⁰ Mr. Justice Story in *Bradstreet v. Insurance Co.*,¹¹ said : “ It does not strike me that any sound distinction can be made between a sentence pronounced *in rem* by a court of Admiralty and Prize, and a

³ *Merrill v. Lake*, 47 Am. Dec. 377.
⁴ *Chapin v. James*, 38 Am. Rep. 412.
⁵ *Keating v. Spink*, 63 Am. Dec. 214.
⁶ *Dutil v. Pacheco*, 82 Am. Dec. 749.
⁷ 2 Am. Rep. 581.
⁸ 84 Cal. 424.
⁹ *v. Bachelder*, 60 Am. Dec.

e. &c., B. R. Co. v. Milwaukee &c. R. R. Co., 68 Am. Dec. 735.
¹⁰ *Herm. Comm.* 583.
¹¹ 23 Wall, 463.
¹² *Wheelwright v. Depuyator*, 3 Am. Dec. 34.
¹³ 3 Sum. 605.

like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*. In each case, the sentence is conclusive as to the title and property, and it seems to me that it must be equally conclusive as to the facts on which the sentence professes to be founded. This, I think, is the settled doctrine in England, and in the courts of the United States. It is a just result from the whole reasoning in *Rose v. Himely*;¹² *The Mary*,¹³ and *Gelston v. Hoyt*.¹⁴ Such is the general rule. . . . In respect to the jurisdiction of courts of prize acting *in rem*, as they are courts sitting under the law of nations, the courts of other nations are competent of themselves to inquire into and ascertain whether there has been any excess of jurisdiction, or not, without any resort to the laws of the particular country where the tribunal is established. But in respect to municipal courts acting *in rem*, but deriving their authority solely from the territorial laws of the sovereign, they are, and must, from the nature of the case, be presumed to be the best judges of the nature and extent of their own jurisdiction, and of its just and legitimate exercise. Their judgment, therefore, affirming that jurisdiction, must ordinarily be conclusive upon all foreign tribunals, subject, however, to this reserve, that the *res* is either within the territory, or is positively or constructively in the possession of the sovereign, or his officers, so that the jurisdiction can, according to the law of nations, rightfully attach in such tribunals. I say, ordinarily conclusive, because no foreign court can be permitted to sit as a court of errors to revise the decisions of municipal courts in the exercise of the jurisdiction conferred on them by the municipal laws. That would be to assume the final interpretation of those laws. But this doctrine again must be understood with its proper limitations that the tribunal is recognized by the sovereign of the country as competent to act in the premises, which competency may be conclusively established from the express recognition of the sovereign, or his silent acquiescence in its decrees."

On a somewhat similar principle, courts of probate have no authority to order the sale of property situate in another State, and the order of sale will be void, even if given with regard to personal property that was in another State¹⁵ at the time of the testator's death, and brought subsequently within the jurisdiction of the court passing the order.¹⁶ A grant of

¹² 4 Cranch, 241.
¹³ 9 Cranch, 136.
¹⁴ 8 Wheat., 246.

¹⁵ *Salmond v. Price*, 42 Am. Dec. 204.
Latimer v. R. R. Co., 97 Am. Dec. 37a.
¹⁶ *Varner v. Bevil*, 47 Ala. 206.

administration made in England to the estate of a person who had resided and died there does not extend even to his property in the colonies,¹⁷ though if the intestate should have been domiciled in England, the court in the colonies might be bound to make a grant to the same person.¹⁸ It is expressly laid down in William's well known work on Executors that it must not be understood, that where a testator dies domiciled in England, leaving assets abroad, the grant of probate can extend to them.¹⁹ In this country, however, it is enacted in the Indian Succession Act, 1865, that, "where the deceased has left property in British India, letters of administration must be granted according to the rules (contained in the said Act), although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India."²⁰ In America, probate courts are limited in their jurisdiction to the cases in which the deceased at the time of his death had an abode in the country where the courts are situate, and letters testamentary or of administration granted in any other country are held to be void.²¹

In England, in *Enohin v. Wylie*,²² Lord Westbury said, "I hold it to be now put beyond all possibility of question, that the administration of the personal estates of the deceased belongs to the court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To determine who are the next-of-kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicile. In short, the court of the domicil is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort." This view was dissented from, however, especially by Lord Selborne who in *Ewing v. Orr Ewing*,²³ said: "It has always appeared to me to be clear that the domicil of a deceased testator or intestate cannot in principle furnish any governing or necessary rule except for the purpose of determining the succession to movable estate. The succession being once ascertained, the rights resulting therefrom belong to, and follow, the person of the living successor, and not the dead

¹⁷ *Atkyns v. Smith*, 2 Atk. 63.

¹⁸ *Burn v. Cole*, Ambler, 416.

¹⁹ *Ibid.*, p. 300.

7 1865.

Harlan's Estate, 85 Am. Dec. 58.

Moore v. Philbrick, 52 Am. Dec. 642.

10 H. L. 15.

10 Ap. Ca. 458.

predecessor. It has never been held that the *forum*, in which such rights may be vindicated, depends on the domicil (as distinguished from the place of residence for the time being, which is sometimes inaccurately so denominated) either of the plaintiff or defendant, in any action or suit; and if the domicil of the living man, whose rights and liabilities are in question, is for that purpose immaterial, I am unable to understand how the place in which those rights are to be protected or those liabilities enforced, can necessarily depend on the domicil of the deceased." After referring to the above cases, Stirling, J., in *Trafford v. Blanc*,²⁴ said: "The rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain as best they can who, according to the law of the domicil, are entitled to that estate; yet where the title has been adjudicated upon by the courts of the domicil, such adjudication is binding upon and must be followed by the courts of this country."

A finding as to the deceased's residence, like that in regard to all jurisdictional facts is conclusive, however, and where a probate court has, upon a petition asserting the essential jurisdictional facts, and after due notice to the parties interested, granted letters testamentary or of administration, the proceedings cannot be avoided collaterally, by proving that the deceased did not die within the jurisdiction of the court.²⁵ Mr. Freeman says: "Any other rule would lead to the most embarrassing results. The residence of a deceased person can be determined only by hearing parol evidence. Different judges may reach opposite conclusions from the same evidence. The parties in interest may at separate times produce different evidence on the same issue. If, after a court had heard and decided the issue concerning the residence of the deceased, the question remained unsettled to such an extent that it could be relitigated for the purpose of avoiding all the proceedings of the court, no person would have the temerity to deal with executors or administrators."²⁶

Abbott v. Coburn, 67 Am. Dec. 736.
 v. Garney, 28 Cal. 520.

24 Wallbaum, 39 Ill. 554.
 25 Fr. Jud.

So also if an enactment relating to the settlement and distribution of the estates of deceased persons does not contain any provision concerning the estates of those who died prior to it, there will be no jurisdiction to administer the estate of any such person, and the proceedings taken will be void for want of it.²⁷ This was the case with the Indian Succession Act 1865, but the Probate and Administration Act expressly enacted that the executor or administrator of a person, dying before its coming into force, would be his legal representative for all purposes; and a probate granted before the Hindu Wills Act came into force has been held to be valid, even though the executor to whom the grant was made, could in such a case have the powers of a manager only.²⁸

Courts of probate have no power to grant probate or letters of administration in respect of the estate of a living person,²⁹ and if a grant is made under a mistake of fact upon the supposition that he is dead, that as well as the proceedings taken in connection with it will be void for want of jurisdiction, and can have no effect.³⁰ Grants of letters of administration are sometimes judged to be void, unless the deceased did in fact die intestate.³¹ The more recent view, however, appears to be that a grant of administration, made by a court having jurisdiction of the subject matter, and of the particular case, is valid, while unrevoked.³² But one who deals with an executor is not protected, if he had notice of the existence of a later will than the one admitted to the probate.³³ There are other limitations also of Probate Courts. Thus, if a Probate Court appoints an executor or administrator, it cannot, while he continues in office, appoint another. Its jurisdiction being exhausted, its further grant of letters is void.³⁴ Neither can it appoint an administrator after an estate has been fully administered upon and distributed to the heirs.³⁵

205. The greatest conflict in regard to the jurisdiction in proceedings *in rem* is in regard to the cases for dissolution of marriage or divorce. In India, the Indian Divorce Act, 1869, provides that nothing contained in the

²⁷ *Coppinger v. Rice*, 33 Cal. 408.

McNeil v. First Congregational Society, 66 Cal. 105.

²⁸ *Girish Chunder Roy v. Broughton*, 1 L. R. XIV Cal. 861.

²⁹ *Swainb. Pt. 6, S. 13, pl. 1.*

³⁰ *Duncan v. Stewart*, 60 Am. Dec. 527.

Withers v. Patterson, 56 Am. Dec. 643.

Giles v. East Ry. Nav. Inst. 32 Am. Rep.

³¹ *Holyoke v. Haskins*, 10 Am. Dec. 372.

Brock v. Frank, 51 Am. 91.

³² *Hugelow v. Hugelow*, 19 Am. Broughton v. Bradley, 73 Am. Dec. 474
v. De La Croix, 6 Wall.

³³ *Griffith v. Frazier*, 4 Cranch 9.

Flann v. Chase, 4

³⁴ *Fisk v. Norvel*, 56 Am. Dec.

Act "shall authorize any court to make decrees of dissolution of marriage, except (a) where the marriage shall have been solemnized in India; or (b) where the adultery, rape or unnatural crime complained of shall have been committed in India; or (c) where the husband has, since the solemnization of the marriage, exchanged his profession of Christianity for the profession of some other form of religion; or to make decrees of nullity of marriage, except in cases where the marriage has been solemnized in India." In America, it appears to be generally settled that the domicile of marriage is not material in regard to the question of jurisdiction in such proceedings, and that the courts of the country where the marriage was celebrated or where the parties dwelt at the time of the marriage, or where the fact giving a right to the dissolution or divorce occurred, have no particular jurisdiction in such cases. The courts appear also to be agreed that the *bonâ fide* residence of the parties within the jurisdiction of any court is sufficient to give jurisdiction in such cases to that court. Mr. Herman speaking of the rule of the American Courts, says: "Jurisdiction in matters of divorce depends in general upon the domicile or residence of the parties to a marriage at the time of the commencement of the proceedings for divorce. A court of any country having jurisdiction, where the parties are then domiciled, has jurisdiction to dissolve their marriage which is valid. Such jurisdiction of the court in respect to such parties is not affected by the residence, allegiance, or domicile, at the time of marriage, place of marriage, or place where the offence in respect of which divorce is sought was committed."³⁶

The English courts did not long recognize a decree of a divorce of a foreign court as a dissolution of a marriage celebrated in England between English subjects.³⁷ In *Deck v. Deck*,³⁸ Sir C. Cresswell said that the husband "could not shake off his allegiance to the law of England by a change of domicile, and the same view was expressed in *Bond v. Bond*.³⁹ Reference was often made to the British tenet of perpetual allegiance as the root of the English doctrine of the indissolubility of the marriage contract." In *Shaw v. Gould*,⁴⁰ Lord Westbury treated that as an unfounded notion, observing that the political maxim of *nemo potest exuere patriam*, which preserves the duty of allegiance, notwithstanding the change of domicile, has no-

³⁶ Herm. Comm. 640.

³⁷ *It v. Lolley*, 2 Russ. & R. C. 1, 317.
Shaw v. Attorney-General, 2 P. D. 161.

³⁸ 2 Sw. and Tr. 90.

³⁹ 2 Sw. and Tr. 93.

⁴⁰ 3 H. L. 56.

thing to do with the personal relations and rights of subjects under civil contracts. The decree of divorce, in that case was pronounced by a Scotch court on the application of a husband who had been hired by the wife's friends to go to Scotland and reside there for forty days, in order to obtain a divorce from the courts there, and Lord Westbury said: "If the court of a foreign country permits the subjects of a bordering nation to resort to it for the purpose only of getting rid of the personal *status* and obligations of husband and wife, which release they cannot obtain in the courts of their own country, it is plain that such foreign court is in reality, by its tribunals, usurping the rights and functions of sovereignty over the subjects of another country, who still retain, and, as soon as the purpose is answered, intend to return to their native country and resume their original position. . . . When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicile are entitled, or even bound, to reject such judgment, as having no extra-territorial force or validity. They are entitled to reject it, if pronounced by a tribunal not having competent jurisdiction; and they are bound to reject it, if it be an invasion of their own laws and policy." The correctness of this view has never been denied, and had been maintained in a number of cases before;⁴¹ but the English courts go much further, and Judges have often considered that to make jurisdiction depend on domicile is against general principles, and would make the dissolution of the marriage depend upon the mere will of the husband, and that in such a case if a decree of nullity were asked by the wife, her domicile would depend upon the very matter in controversy.⁴² The grounds on which the non-recognition of such judgments in England was based, have long since been considerably shaken,⁴³ and the recognition is not refused now, if both the parties were at the time of the decree *bonâ fide* domiciled in the country where that court had jurisdiction.⁴⁴ In *Shaw v. Gould*, cited above, Lord Westbury himself said: "The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree

⁴¹ *Dolphin v. Robins*, 7 H. L. Cas. 390.

⁴² *Niboyet v. Niboyet*, 4 P. D. 1.

⁴³ *Warrander v. Warrander*, 2 Gl. and Fin. 541.

being made in a *bonâ fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the Judges in *Lolley's case*." In *Wilson v. Wilson*,⁴⁴ Lord Penzance said: "It is not disputed that if the petitioner was domiciled in England at the time the suit was commenced, this court has jurisdiction . . . It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled."

The English courts do not admit, however, that the domicile of the wife alone, even when she can adopt a separate domicile within the territory is sufficient to give jurisdiction.⁴⁵ Thus in the recent case of *Green v. Green*,⁴⁶ Gorell Barnes, J., said: "I have looked into the cases to which I have been referred from the time of *Lolley's case* down to *Tollemache v. Tollemache*⁴⁷ and *Harvey v. Farnie*,⁴⁸ and I find that there is not one in which it has ever been decided that a man can be divorced from his wife by the laws of a country in which he has never been resident or domiciled. The petitioner here has always been a domiciled Englishman, and his wife, though an American by domicil of origin, upon her marriage with the petitioner became a domiciled Englishwoman. It appears to me that she left him of her own accord, and without any cause whatever. In my opinion the American decree was unjustly obtained against the petitioner, who never submitted himself to the jurisdiction of the American Court, and it was obtained on grounds which would not have entitled the parties to a decree in this court. There is no case precisely in point; but on the principle laid down in *Shaw v. Attorney General*, it is clear that though the decree of divorce may be treated as valid in America, this court cannot recognize it as putting an end to a marriage which is binding in this country—the petitioner being domiciled in England."

Nor do the English Courts consider any residence not amounting to domicile sufficient to confer such jurisdiction on a court. In *Shaw v. Gould*, Lord Colonsay observed that if the parties go to Scotland *bonâ fide* and not merely for the purpose of obtaining a divorce there, "and being resident there for a considerable time, though not so as to change the domicile for all

⁴⁴ 2 P. M. 435.

⁴⁵ *Shaw v. Attorney General*, 2 P. & M. 176
1 P. D. 130.

⁴⁶ 1891 P. 92.

⁴⁷ 1 Sw. and Tr.

⁴⁸ 5 Ap. Cas. 43.

purposes, and then suppose that the wife commits adultery in Scotland and that the husband discovers it, and immediately raises an action of divorce in the court in Scotland where the witnesses reside, and where his own duties detain him and that he proves his case and obtains a decree, which decree is unquestionably good in Scotland, and would, I believe, be recognized in most other countries, I am slow to think that it would be ignored in England because it had not been pronounced by the court of divorce here." In *Wilson v. Wilson*, Lord Penzance said: "Whether any residence in this country short of domicile, using that word in its ordinary sense, will give the court jurisdiction over parties whose domicile is elsewhere, is a question upon which the authorities are not consistent."

In Scotland, however, it is the constant practice of the courts to decree divorce *à vinculo* for proved adultery in all cases in which the parties were at the date of the proceedings properly subject to their jurisdiction, applying the *lex fori*, no matter in what country the marriage may have been contracted.^{48a} In *Shaw v. Gould*, Lord Westbury said: "It must be admitted that there has been a series of decisions in the Scotch Courts to the effect that a permanent domicile of parties is not necessary to found a jurisdiction in the Scotch tribunals to pronounce a decree of divorce *à vinculo* between parties who have been married in England, or any other foreign country; and that if the defendant in any such suit has been resident for forty days in Scotland, it is sufficient to subject him to the jurisdiction of a Scotch tribunal in a suit for divorce. It would, however, seem to be the law of Scotland that if divorce be sought on the ground of adultery, the adultery must have been committed in Scotland. The whole reasoning of the Judges in the Scotch cases is founded upon the right of the Scotch Courts, to redress any wrong committed by either of the spouses if the act be done within the territory of Scotland. And that if divorce be sought on the ground of a personal wrong committed within the jurisdiction of a Scotch Court, it is the right of the party who suffers the wrong to have that remedy which the law of the country affords. Such reasoning, however, although it may be good for maintaining the validity of the Scotch divorce in Scotland, cannot be required to be accepted by the tribunals of another country."

^{48a} *Warrender v. Warrender*, 2 Cl. and Fin. 488.

The American Courts, on the other hand, usually consider the residence of the applicant alone at any place sufficient to give jurisdiction to the courts of that place. It is generally held there, "that as a proceeding in divorce is intended to affect the *status* of the parties, and is therefore essentially *in rem*, the judgment pronounced, whether in a foreign country or in a sister state, by a court having lawful jurisdiction of the cause, and in the absence of fraud, is valid and binding everywhere and in all subsequent controversies, provided the applicant was *bond fide* domiciled within the territorial jurisdiction of the court, although the other party, being a non-resident, was notified only by advertisement or some other species of constructive service."⁴⁹ In fact it is considered to be a well-settled rule, that "the actual *bond fide* residence of either husband or wife within a State will give to that State authority to determine the *status* of such party, and to pass upon any question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offence; and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bond fide*, and does not confer upon the courts of that state or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party."⁵⁰ The limitation of *bond fide* residence has been recently recognized in *St. Sure v. Lindsfelt*,⁵¹ in which case the wife had returned to Sweden a few months before she filed her petition of divorce there, but she went back to Wisconsin and continued to live with the husband for five years until he went to the war, which was about a year prior to the rendition of the judgment of divorce by the Court in Sweden. The Supreme Court of Wisconsin held that judgment to be void, and Cassoday, J., in delivering the judgment of the Court said: "Undoubtedly every country has the power to absolutely fix, regulate and control the marriage *status* of each and all of its own citizens, but no country or state has

⁴⁹ *Pennoyer v. Neff*, 96 U. S. 714.
Roth v. Roth, 44 Am. Rep. 81.
Harding v. Alden, 9 Me. 140.
Rush v. Rush, 2 Am. Rep. 179.

⁵⁰ *Hurlen v. Shannon*, 115 Mass. 498.
Hare v. Hare, 10 Tex. 365.
⁵¹ 33 Am. St. Rep. 40.

The ground upon which the validity of such decrees is maintained, is, that marriage being a relation involving the social *status* of the parties to it, the State of which the complaining party is a *bonâ fide* resident, has the right to determine his matrimonial status; and, in view of the new relations that may be formed in consequence of the dissolution of the marriage in the State where the decree is pronounced, public policy requires the recognition of the validity of such decrees in other States. Thus, a divorce decreed in a foreign State, according to the laws thereof, when a husband removes to that State and acquires a domicile there, without intending to commence proceedings for a divorce against a wife who is living apart from him without justifiable cause, but afterwards commences such proceedings, after leaving a summons at the last and usual place of abode of the wife, and giving notice of the pendency of proceedings in the state of her domicile, by publication in the papers of that State, obtains a decree, such decree is valid and effectual. Mr. Herman says—"There can be no question but that a divorce granted by a court of a foreign state, where the parties to a suit are domiciled in different jurisdictions, and the plaintiff does not know, and cannot by diligent inquiry ascertain, the abode of the defendant, and cannot, therefore, give actual notice of his suit, would,

²² Cook v. Cook, 43 Am. Rep. 708.
Both v. Both, 44 Am. Rep. 81.

²³ Dutcher v. Dutcher, 39 Wis. 695.

under such circumstances, be valid in every other state.⁵⁴ A decree of divorce valid and effectual by the laws of the State in which it was obtained is valid and effectual in all other states, and a sentence of divorce obtained *bonâ fide* and without fraud, pronounced between parties actually domiciled in the country, whether natives or foreigners, by a competent tribunal having jurisdiction over the case, is valid if valid in the State where it is rendered, and is a complete dissolution of the marriage in whatever country it may have been originally celebrated.⁵⁵ But even the United States, the Supreme Court of Wisconsin in *Cook v. Cook*,⁵⁷ said: "Although marriage is a *status*, and every State has the right to fix, regulate and control the same, as to every person within its jurisdiction, even though one of the parties may at the time actually reside in another State, yet a judgment of divorce granted in another State, under statutes making jurisdiction dependent entirely upon the residence there of the party applying for a divorce, at the suit of a husband against a wife, who resided in this State, and who was not personally served with notice and did not appear in the action, but was ignorant of its pendency until after the judgment was rendered, is not a bar to a subsequent suit by such wife in this State for a divorce, alimony, allowance and a division of the property of such husband situated within this State, especially where such foreign judgment was based upon an alleged cause of action which was false in fact." The rule was stated still more broadly in *Doughty v. Doughty*,⁵⁸ in which it was said: "A judgment of a court of one State granting a divorce to a husband, whose wife is domiciled in another State, will not be entitled to recognition by the courts of the latter State, if the husband could have given to the wife actual notice of the suit for divorce, but refused or neglected to do so. And, where the evidence on which such a judgment purports to be founded appears to be fabricated, a court of equity of another state may grant relief to her wife against it as void. The right to have a fair opportunity (such as the defendant can make effectual to his protection) to make defence against any charge is secured by a rule of general law, resting upon a principle of natural justice."

⁵⁴ Herm. Comm. 645.

⁵⁵ *Osceola v. Wilson*, 9 Wall. 108.

⁵⁶ Herm. Comm. 660.

⁵⁷ 43 Am. Rep. 706.

⁵⁸ 27 N. J. Eq. 315.

Affirmed in 26 N. J. Eq. 581.

rule even as thus modified is not accepted in the New York State, where the law appears to be the same as in England. Thus in *People v. Baker*,⁵⁹ the New York Supreme Court held that, "A divorce granted in another State, against a citizen of this State, domiciled and actually abiding here throughout the pendency of the proceedings there, without appearance or actual notice, is of no effect in this State." Similarly in *Jones v. Jones*,⁶⁰ Andrews, J., in delivering the judgment of the New York Supreme Court, said: "The contract of marriage cannot be annulled by judicial sanction any more than any other contract *inter partes*, without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."⁶¹ The learned editors of the American State Reports in their notes on this case, speaking of this assertion as startling, say: "A very large percentage of the suits for divorce brought in the United States have been commenced in a State wherein the plaintiff resided, and of which the defendant was a non-resident; and the services of summons in such cases have been made beyond the State, and generally by some mode of constructive service authorized by the laws of the State in which the suit was brought. Unless the marriage relation is a *res*, existing and being within the State where the plaintiff resides, so that the judgment dissolving it may be treated as a judgment *in rem*, conclusively establishing his *status*, as against all persons, then there is no resisting the conclusion that the final decree is utterly void for want of jurisdiction over the person of the defendant; and many thousand people must be to-day living as bigamists, who have procured decrees of State courts, in conformity to State statutes, purporting to dissolve the previous marriages. What is said in the principal case on this subject, though manifestly the deliberate conclusion of the court, was not absolutely essential to its decision. It is, however, in entire harmony with the previous case of *People v.*

⁵⁹ 17 Am. Rep. 274.

⁶⁰ 2 Am. St. Rep. 451.

⁶¹ Hunt v. Hunt, 25 Am. Rep. 120

v. v. Wilson, 10 Wall. 105
O'Don v. O'Don, 101 N. Y. 23

Baker, where the determination of the question was necessary, and may be regarded as finally settling the law for the State of New York. Elsewhere, so far as we can ascertain, a different rule prevails,—one under which the judgment is regarded as operating *in rem*, and conclusively establishing the *status* of the parties.”

CHAPTER IX.

FOREIGN JUDGMENTS.

206. A foreign judgment is the judgment of a foreign court, which term is in British India, applied to every "court situate beyond the limits of British India and not having authority in British India, nor established by the Governor-General in Council."¹ The courts in England, excepting the Privy Council which has authority in British India, are therefore foreign courts so far as British India and its courts are considered. A similar view is usually taken in the other civilized countries. In England, the judgments of the courts in Scotland and Ireland have, only by special legislation, recently been made equivalent in their operation to English judgments; and judgments of the courts in the British Colonies and possessions and in the Isle of Man, and of Consular Courts in Mahomedan countries are still treated as foreign judgments. It was said by the Queen's Bench Court in Upper Canada that "all judgments are considered foreign, if given by courts whose jurisdiction does not extend to the territories governed by our laws."² The English courts have always been, and still are most forward in giving effect to foreign judgments, the Italian courts coming close behind them; while most of the continental nations cling to the principle of formal or practical reciprocity, and France, the most reserved in that respect,³ still refuses all

(a) Art. 121 de l'Ordonnance de 1629 enacted: *Les jugements rendus, contrats ou obligations reçus es royaumes et souverainetés étrangères, pour quelque cause que ce soit, n'auront aucune hypothèque ni exécution en notre dit royaume, ainsi tiendront les contrats lieu de simples promesses et non obstant les jugements, nos sujets contre lesquels ils auront été rendus, pourront de nouveau débattre leurs droits comme entiers par devant nos officiers.* The effect of that provision was that: (1) *Les jugements étrangers ne pouvaient en aucun cas être ramenés à exécution en France, sans avoir été rendus exécutoires par un tribunal Français;* (2) *les jugements rendus à l'étranger contre des Français n'avaient en France aucune autorité, puisque le Français pouvait débattre ses droits comme entiers devant les juges de son pays.* The first of these two provisions has been reproduced in the Code Napoléon, as well as in the Civil Procedure Code, and the Court of Cassation appears to hold even now that the grant of *exequatur* is not a mere form, but *que le fond doit être revu*, and that it can be accorded only by a judgment, which involves for the tribunal the duty *d'apprecier par lui même les prétentions des parties, et pour celles-ci la faculté de les débattre de nouveau.* Toulhier considers it as an established rule that no foreign judgment can be executed in France, except upon a full cognizance of the cause before the French Tribunals. The second provision of the *Ordonnance* of 1629 has not found a place in later

¹ Sec. 2 Act XIV of 1892² *McFarlane v. Derbyshire*, 9 Q. B. 12.³ *Lac. Choise Jugeo*, 41

recognition to foreign judgments, except those relating to the status or capacity of persons, till after the grant to them of an *exequatur* by certain tribunals in France, and recognizing that exception also, as *le statut personnel*

that that provision still retains its legal force. The Court of Cassation, in fact, considers it applicable even to decisions against strangers, but it is contended by some jurists that it must be restricted to those against Frenchmen. Lacombe after referring to certain articles of the Codes, says : *On ne peut donc faire résulter de ces articles la faculté de révisions ni en faveur des Français, ni en faveur des étrangers ; et si nous l'admettons pour les premiers, c'est parce que nous croyons que les principes suivis à cet égard dans notre ancienne jurisprudence nous régissent encore aujourd'hui, et que nous nous basons sur la seconde partie de l'art. 121, que nous croyons encore en vigueur.*⁴

The Ordonnance of 1629 has sometimes been construed as not having required an examination of the merits before the grant of the *exequatur* for execution, and M. Constant representing that view says : *Il ne doit pas s'ériger en juridiction d'appel et entrer dans la mérite de la cause, en examinant à nouveau les droits des parties et en renouvelant ou en reformant le jugement.*⁵ It was stated by la Cour d'Angers in an arrêt du 4 Juillet 1866 ; *L'intercession des tribunaux français, en cette matière, ne peut se borner sans doute à l'homologation aveugle du jugement étranger ; la justice est appelée au contraire à examiner si le jugement étranger respecte les principes de droit des gens et de droit public, les règles d'ordre et de morale reconnues par la législation française ; mais cet examen, commandé dans l'intérêt général de la souveraineté française, n'a pas à s'immiscer dans les intérêts privés ; le jugement est supposé conforme aux lois du pays dans lequel il a été rendu et il est protégé par la présomption légale de vérité attribuée par toutes les nations civilisées à l'autorité de la chose jugée.*⁶ The weight of authority appears, however, to be in accordance with the view taken by the Court of Cassation : M. Moreau after combating most of the arguments urged in support of the opposite view says : *Nos juges ont un pouvoir de contrôle entier and absolu.*⁷ Dans notre pensée, l'autorité à laquelle on demandera de permettre l'exécution d'une sentence étrangère devrait avoir le droit d'entrer dans l'appréciation du fond même du jugement, de s'assurer qu'il a été bien rendu, étant donnés les faits et la loi qui leur est applicable ; en conséquence elle pourrait refuser l'exequatur non seulement pour défaut de validité ou violation de l'ordre public, mais aussi pour

And it may also be considered as settled, that the same rule is applicable to a foreign judgment pleaded in bar. Thus M. Moreau says : *Quant à prétendre que l'autorité à attribuer aux jugements étrangers n'a pas été prévue par nos lois, puisqu'elles ne s'occupent que de la force exécutoire, ce n'est qu'une pure subtilité fondée sur une interprétation trop littérale. Il est impossible de prendre nos textes au pied de la lettre ; nous sommes très convaincu qu'ils s'appliquent aussi bien à l'autorité de la chose jugée qu'à la force exécutoire ; en sorte qu'il est incorrect d'affirmer que cette matière n'est pas réglée par nos Codes ; l'Ordonnance de 1629 a bien été abrogée par les textes précités, d'autant plus qu'ils sont dans le même esprit que l'Ordonnance de 1629, qui, comme eux, ne s'occupe textuellement que d'hypothèque et d'exécution, et ne peut être appliquée que par argument à l'autorité de la chose jugée. Aujourd'hui la matière est réglée par les Art. 546 C. P. C., 2123 C. P. C., dans lesquels on ne retrouve aucune trace de la distinction proposée, distinction d'ailleurs qu'il est impossible de justifier autrement que par un parti pris de traiter l'étranger plus défavorablement que le Français.*⁸ Quant aux arguments tirés des Art. 546 C. P. C. et 2123 C. C., ils sont peut-être plus spécieux, mais non plus solides. Ils reposent sur l'interprétation étroite du mot exécution. . . . Par ce mot, on ne veut entendre que les actes matériels de coercition sur la personne ou sur les biens, auxquels le jugement autorise à procéder, et cette donnée exclut naturellement l'autorité de la chose jugée. Mais elle est purement arbitraire. Il n'est pas croyable que le législateur ait eu présente à la pensée cette distinction surtout de l'autorité de la chose jugée et de l'exécution forcée ; il est au contraire comme évident qu'en parlant d'exécution, il s'est référé en général aux effets des jugements sans distinguer. Or à coup sûr l'autorité de chose jugée et l'exception rei judicate qui la sanctionne rentrent dans les effets des jugements. Et même est-ce que, dans un certain sens et à ne considérer que le résultat obtenu, reconnaître à un jugement étranger l'autorité de la chose jugée, ce n'est pas lui donner exécution tout comme procéder à une saisie ? On peut se demander en quoi diffère

⁴ Loc. Chose Jugée 57.

⁵ Cons. Exe. Jug. Etr. 9.

⁶ Cons. Exe. Jug. Etr. 29.

⁷ Mor. Eff. Int. Jug. 117.

⁸ Mor. Eff. Int. Jug. 262.

⁹ Mor. Eff. Int. Jug. 101.

devant toujours suivre la personne, dans quelque lieu qu'elle passe: l'état de l'étranger en France étant régi par son statut personnel, il s'ensuit que les décisions des tribunaux de son pays, seuls compétents pour fixer ou pour modifier cet état, doivent être applicables de plein droit en France, comme la loi même en vertu de laquelle elles ont été rendues, alors même qu'elles seraient basées sur des règles contraires à celles de notre droit civil."⁹

Highest English Judges have disclaimed the right of sitting in appeal on foreign judgments. Lord Hardwicke is reported to have said in *Boucher v. Lawson*,¹⁰ that when any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive as to all other courts. In *Geyer v. Aguilar*,¹¹ Lord Kenyon, C. J., said, that the French Court "proposed to proceed according to French law, but in reality made the law a stalking horse for an act of piracy," but that "whether or not the court arrived at that conclusion by proper means, I am not at liberty to enquire. I feel this however as the grossest injustice." Cockburn, C. J., said in *Dent v. Smith*,¹² that "we are not to sit here as a court of appeal against any judgment pronounced by a court which must be taken to be one of competent jurisdiction in the administration of Russian law." Blackburn, J., in delivering the opinion of the judges to the House of Lords in *Castrique v. Imrie*,¹³ said: "The plaintiff asks an English Court to sit as a Court of Appeal from the French Court, which is not the province of an English Court." The same

*en droit le défendeur qui oppose comme titre libératoire un jugement d'absolution rendu à l'étranger, du créancier qui présente comme titre de créance un jugement également étranger, le possesseur qui combat la revendication par un jugement qui a déboute son adversaire, du propriétaire qui veut se faire mettre en possession en vertu d'un jugement étranger. Bien mieux, pourquoi autoriser le défendeur à opposer un jugement étranger en compensation, alors qu'il ne pourrait sans un exequatur le ramener à exécution et obtenir paiement, comme logiquement doit le décider le système que nous combattons? La compensation n'est-elle pas assimilée à un paiement? Il faut donc reconnaître que l'exceptio rei judicatæ est bien un acte d'exécution, ou plutôt que la loi en parlant d'exécution a voulu embrasser tous les effets des jugements."*¹⁴ Nous persistons donc à ce que les jugements étrangers ne sauraient avoir, sans le consentement de la Souveraineté, l'autorité de la chose jugée ailleurs que sur le territoire où ils ont été rendus. Il y a en effet nombre de cas dans lesquels l'autorité de la chose jugée suffira à faire produire au jugement toute son efficacité, où l'exceptio rei judicatæ sera suffisante pour faire obéir à celui qui a triomphé toute l'utilité qu'il attendait du jugement. Ainsi donc en fait, en pratique, l'autorité de la chose jugée constitue une véritable exécution du jugement, et il n'y a aucune raison pour distinguer, quant à la valeur extra-territoriale, entre elle et la force e

⁹ Cons. Exe. Jug. Etr. 20.
¹⁰ Cas. Temp. Hard. 99.
¹¹ 7 T. R. 696.
¹² 4 Q. B. 446.

¹³ L. R. 4 H. L. 437.
¹⁴ Mor. Eff. Int. Jug. 103.
¹⁵ Mor. Eff. Int. Jug. 243, 245.

view has been taken in *Bank of Australasia v. Nias*,¹⁶ the principle on which that case was decided being, as observed by Stirling, J., in *Trafford v. Blanc*,¹⁷ "that the courts of this country do not sit to hear appeals from foreign tribunals, and that if the judgment of a foreign court is erroneous, the regular mode, provided by every system of jurisprudence, of procuring it to be examined and reversed ought to be followed. Neither do the courts of this country sit to rehear causes which have been tried abroad."

It has also been affirmed in several cases,¹⁸ that a foreign judgment cannot be assailed by any defence that would have been admissible in the original suit in the foreign court. Thus Sir Robert Phillimore, delivering the judgment of the Privy Council in *Messina v. Petrocchino*,¹⁹ said that the questions raised "would be properly raised on appeal to the Greek Appellate Court; and could not properly be discussed either before the court at Malta, or before this tribunal." Similarly, Lord Denman in *Henderson v. Henderson*,^{19a} observed that the principle of English jurisprudence assuming the justice of foreign judgments "steers clear of an inquiry into the merits of the case upon the facts found: for whatever constituted a defence in that court ought to have been pleaded there." Mr. Piggot broadly lays down²⁰ that "in an action on a foreign judgment, the English Court will not entertain any matter which should have been raised by way of defence to the foreign suit, or which being properly a ground of appeal, is cognizable only by the appellate tribunals of the country in which the judgment was pronounced." This principle was directly recognized in *De Cosse Brissac v. Rathbone*,²¹ and in *Trafford v. Blanc*, in which it was held that "a foreign judgment binds, notwithstanding the discovery of fresh evidence, and although the whole of the facts were not before the foreign tribunal at the time it delivered its decision." The assistance of the English Court is "invoked to clothe the legal obligation which has arisen abroad upon the judgment of the foreign court, with the auxiliary international sanction which is resident in the English sovereign authority. It is evident that it cannot go beyond the power it is requested to assume, and which assumption is ratified by international comity, and constitute itself a Court of Appeal by re-hearing the merits of the case upon which the foreign court has already adjudicated."²² Even in

¹⁶ 44. & El. N. S. 717.

¹⁷ 36 Ch. D. 617.

¹⁸ *Vanquelin v. Bonard*, 15 C. B. N. S. 341.
Rankin v. Goddard, 1, 89 Am. Dec. 718.
Lazier v. Westcott, 82 Am. Dec. 404.

¹⁹ L. R. 4 P. C. 160.

^{19a} 6 Ad. & El. N. S.

²¹ 6 H. & N. 301.

²² *Page For. Jud.* 101.

this country, Plowden, J., in *Bikrama Singh v. Bir Singh*,²³ spoke of it as a "recognized principle that the court hearing the second suit does not sit as a Court of appeal from the foreign court, and that it will not, therefore, inquire whether that court proceeded correctly either as to its own course of procedure or its own law:" and said that "matters which might and ought to have been urged in that court cannot be considered in the second suit."

The same principle is recognized by the American Courts also. Mr. Justice Story, speaking of the necessity of the recognition of foreign judgments, says in his *Work on the Conflict of Laws*,²⁴ that "it is indeed very difficult to perceive, what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew in a suit upon the foreign judgment. Some of the witnesses may be since dead, some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation. Is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case upon new evidence? or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed *ex æquo et bono*? or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side, for under such circumstances it would be equivalent to granting a new trial." So also, Mr. Wells says: "There can be no inquiry into the

²³ 1858 P. B. No. 191.

²⁴ *Id.* p. 828.

merits of the claim, nor whether the judgment was recovered according to law, although it may be alleged that the plainest dictates of justice were wantonly violated. . . . Whether it be an error of fact, or of law, in the original proceedings, it cannot avail as defence in another State.²⁵ . . . A court cannot inquire whether judgment was given with or without a jury, or whether evidence was or was not adduced, &c.²⁶ And it has even been held that a judgment of a court of competent jurisdiction, although rendered in an unknown form of proceeding as to the practice of another State, and apparently without service of process, cannot be treated as a nullity while unreversed where rendered.²⁷ ²⁸

207. In earlier times, this recognition was based usually on the comity which subsists between nations and the mutual advantages to be secured by its exercise. As far back as the time of Charles II, Lord Nottingham said²⁹ as to a foreign sentence of divorce, that "it is against the law of nations not to give credit to the sentences of foreign countries, till they are reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another. And how can we refuse to let a sentence take place till it be reversed. And what confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences." In *Alves v. Bunbury*,³⁰ Lord Ellenborough, C. J., said; "By the *comitas gentium*, the courts of different countries will recognize and enforce the judgments of each other." In *Geyer v. Aguilar*,³¹ Lord Kenyon, C. J., said: "Civilized nations profess to be governed by certain rules, and the comity due from the courts in one country to those in another induces them to give credit to each other's acts; and so we must continue to act in this country until the Legislature shall think fit to forbid it." Sir George Jessel, M. R., in *Dawkins v. Simonette*,³² said: "The effect of the judgment of the Neapolitan Court, if fairly obtained, will be that it will be followed by the English Court by reason of the comity of nations." Lord Brougham in *Houl-ditch v. Marquess of Donegall*³³ said: "The great rule of all

²⁵ *Milne v. Van Buskirk*, 9 Iowa, 558.
State of Indiana v. Helmer, 21 Iowa, 370.
²⁶ *Conway v. Ellison*, 14 Ark. 302.
²⁷ *Weyer v. Zano*, 3 Ohio, 305.
²⁸ *Well. Res. Jud.* 473.

²⁹ *Kennedy v. Cassilis*, 2 Swanst., 326 (n).
³⁰ 4 Camp. 28.
³¹ 7 T. R. 691.
³² 59 L. J. P. 30.
³³ 2 Cl. & Fin. 477.

civilized countries among each other is, that a judgment in any one of them may be made the ground of proceeding validly and with effect in this country." In *Castrique v. Imrie*,³⁴ Cockburn, C. J., said that it was by virtue of the comity of nations alone, that "the judgments of the tribunals of one country are respected in those of another."

The doctrine of comity was, however, uncertain and vague, especially as there was no generally recognized rule of international law to regulate its application. It was observed by Dr. Story himself that in a suit brought to enforce a foreign judgment, "it is often urged that no sovereign is bound *jure gentium* to execute any foreign judgment within his dominions; and therefore, if execution of it is sought in his dominions, he is at liberty to examine into the merits of the judgment, and to refuse to give effect to it, if upon such examination it should appear unjust and unfounded. He acts in executing it upon the principles of comity; and has therefore a right to prescribe the terms and limits of that comity."³⁵ In *Galbraith v. Neville*,³⁶ Buller, J., said: "I have often heard Lord Mansfield repeat what was said by Lord Hardwicke in *Isquierdo v. Forbes*;³⁷ and the ground of His Lordship's opinion was this:—When you call for any assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are in the wrong, and it was on that account that he said he would examine into the propriety of the decree."

In this view of things one plea after another came to be admitted against the conclusive effect of foreign judgments, and the uncertainty of the principle of mere comity did not furnish a sound basis for a restriction or even formulation of the grounds to which foreign judgments might be open to attack. In some later decisions, therefore, comity was, as a factor in influencing the effect of foreign judgments, altogether ignored. "They rest wholly," it was observed in *Hilton v. Guyott*,³⁸ "on the practical and sensible doctrine, which is applied to domestic judgments, that a litigant who has had a fair opportunity to try his cause before a competent tribunal, and has availed himself of it, should acquiesce in the result, and, if he has reason to complain, should pursue those means of correcting error provided by the jurisprudence of the tribunal instead of resorting to another court."

³⁴ 5 C. B. N. S. 405.
³⁵ Story *Con. Laws* 821.
³⁶ 1 Doug. 5 (π).

³⁷ H. 24 Geo. 3 B. R.
³⁸ 42 Fed. Rep. 257.

208. In time, therefore, the ground of the recognition of foreign judgments was gradually shifted to public policy and general justice, and they commenced to be enforced as creating, at least *prima facie*, an obligation enforceable like all other foreign obligations in the English courts. This doctrine of obligation was laid down in *Russell v. Smyth*,³⁹ which was a suit for costs awarded by a Scotch Court, and in which Parke, B., said: "Where the court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country." In *Williams v. Jones*,⁴⁰ he again observed, that "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of Foreign and Colonial Courts are supported and enforced." This was approved in 1870 in the cases of *Godard v. Gray*⁴¹ and *Schibsby v. Westenholz*,⁴² Blackburn J., having in the former case, said: "It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and in those States which are governed by the Common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., The mode of pleading shows that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question, but in truth it goes to the root of the matter." In *Grant v. Easton*,⁴³ Brett, M. R., said that "an action upon a foreign judgment may be treated as an action in either debt or *assumpsit*; the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment." The doctrine of obligation was quoted

³⁹ 9 M. & W. 810.⁴⁰ 13 M. & W. 633.⁴¹ L. R. 6 Q. B. 139.⁴² L. R. 6 Q. B. 155.⁴³ 13 Q. B. D. 302.

with approval in this country by Plowden, J., in *Bikrama Singh v. Bir Singh*.⁴⁴

This doctrine has the advantage of certainty, and on its basis the grounds of defence against a foreign judgment may be sharply defined, as "anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action."⁴⁵ But it has been alleged against it, that as put forward it is not correct, and that it can receive proper effect only with the aid of the earlier principle of comity. Thus, it is argued that a foreign judgment can give rise to a legal obligation only in the country in which it is pronounced, and that its obligation in any other country, to which the judgment-debtor may go, will be only moral and therefore legally unenforceable, until it is there clothed again with another sanction auxiliary to it, and thus endued with the power resembling that which it had lost; and that this can be done only by virtue of the comity of nations.⁴⁶ Thus Plowden, J., in *Bikrama Singh v. Bir Singh*,⁴⁷ said: "It may well be affirmed that the judgment of a foreign court does not create a legal obligation elsewhere on a defendant who was not subject to the laws of the Foreign State, according to the laws of the State which is called on to enforce the judgment."

b Mr. Pigott says: "The judgment is pronounced in the foreign state—the sanction comes into being in the foreign state—but the sanction, that is, the liability to evil, not only resides in the foreign state, but is enforced by the sovereign authority of that state, and from its very nature by that sovereign authority alone. The enforcement of its proper sanction is of the essence of the sovereignty; it cannot be taken out of it. Therefore since the enforcement cannot be removed, neither can the sanction, neither can the obligation. The whole system, judgment, obligation, sanction, enforcement of the sanction, forms the unit, which is indivisible. Therefore, the conclusion is obvious, that a judgment-debtor of a foreign state, leaving that state, must leave behind the legal obligation (using this term in its strict sense) of obedience to the judgment which has created the obligation; and further, that coming into this country, he cannot be considered a legal debtor here, but only a legal debtor of and in the foreign state. . . . But it is manifestly unjust to the judgment-creditor, and derogatory to the dignity of the State that such a simple expedient of avoiding the sanction should be tolerated; some remedy must be found. The debtor has fled to another State; that State must be asked to enforce a sanction which is foreign to its authority; in other words, it must be asked to lend the aid of its courts to clothe the foreign obligation with a sanction of its own; this will be a great convenience to the country whose sanction is to be enforced; in return, the position being reversed, it also will enforce the sanctions of the other State. Now this process of inter-state arrangement being repeated between these and other States would, in time, become an inter-state or international custom: and, being a custom which is essentially courteous, and being reciprocal, it is a custom which falls under the head of international courtesy or comity: in other words, what is generally understood by comity of nations."

⁴⁴ 1868 P. R. No. 191, p. 505.
⁴⁵ L. R. 6 Q. B. 148.

⁴⁶ Pig. For Jud. 15.

⁴⁷ 1868 P. R. No. 191, p. 508.

209. The conclusiveness of Foreign judgments as a plea was never denied in England, and has long been expressly affirmed by the highest judges. Even when a century ago, foreign judgments were enforced there as a matter of mere international comity and treated usually as mere *prima facie* evidence,^c their conclusive effect by way of defence was recognized and admitted. In *Ricardo v. Garcias*,⁴⁸ Lord Campbell said: "A foreign judgment may be pleaded as *res judicata*; because the foreign tribunal has clearly jurisdiction over the matter, and both parties being before the tribunal which adjudged between them, that is a bar to a subsequent suit in this country for the same cause." Citing *Tarleton v. Tarleton*⁴⁹ and other cases, Mr. Foote in his Work on Private International Law, says: "It was held in more than one case even by those who most strenuously urged the liability of foreign judgments to review when a plaintiff sought to enforce them here, that they were absolutely conclusive as to the facts involved in them and the grounds on which they rested, when pleaded in bar." In *Phillips v. Hunter*,⁵⁰ Eyre, C. J., in his judgment said: "It is in one way only that the sentence or judgment of the court

^c The anomaly of a foreign judgment on which a suit was brought being considered merely as *prima facie* evidence of the debt for which the judgment was obtained, ... from the formal character of the English litigation in accordance with which an action brought on a foreign judgment to recover the judgment-debt was in form at least an action for debt. In *Sinclair v. Fraser*,⁵¹ it was said that "foreign judgments are *prima facie* evidence of a debt, although it is competent to the defendant to impeach the justice of them or to show that they were irregularly or unlawfully obtained." This was quoted with approval in *Arnott v. Redfern*,⁵² by Best, C. J., who added, that "this is founded on a plain and obvious principle of natural justice." Thus in *Houlditch v. Donegal*,⁵³ Lord Brougham said: "In my judgment, it has always hitherto been recognised in Westminster Hall that the judgments of foreign courts are traversable, may be averred against and are only *prima facie* evidence in actions to support which they are given in evidence." Other authorities were cited in that case to show that Lord Mansfield, and Buller and Bayley, J.J., had held the same view; and the language of Lord Brougham in *Don v. Lippman*⁵⁴ is, in effect, to the same purpose. So also, in the United States in *Burnham v. Webster*,⁵⁵ Woodbury, J., speaking of foreign judgments, said: "When offered and considered elsewhere (outside the Government in which they were rendered), they are, *ex comitate*, treated with respect, according to the nature of the judgment and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that Government treats our judgments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract and hence to be respected elsewhere by analogy according to the *lex loci contractus*. With these views I would go to the whole extent of the cases decided by Lord Mansfield and Buller, J., and where the foreign judgment is not *in rem*, as it is in admiralty, having the subject-matter before the court, and acting on that rather than the parties, I would consider it only *prima facie* evidence as between the parties to it".

⁴⁸ 12 Cl. & Fin. 1.

⁴⁹ 4 M. & S. 20.

⁵⁰ 2 H. Bl. 411.

⁵¹ 20 How. St. Tr.

⁵² 3 Bing. 357.

⁵³ 8 Bligh. N. S. 301.

⁵⁴ 5 Cl. Fin. 1.

⁵⁵ 13 Q. B. D. 302.

⁵⁶ 1 Wood B. & M. 172.

of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *primâ facie* sufficient to raise a promise. We examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." In *Reimers v. Druce*,⁵⁷ Lord Romilly, M. R., referred to this distinction, and observed that "it has certainly not been carried out to the extent laid down by Eyre, C. J., still it is a distinction which has so much authority to support it, that it must be regarded, at least to some extent, in considering the value of a foreign judgment here." Mr. Black, speaking of the American Courts says,⁵⁸ "We may cite some of the earlier rulings of our own courts to the proposition that a foreign judgment, when sought to be enforced by a suit brought upon it, is only *primâ facie* evidence and may be impeached for irregularity and rebutted by evidence, whereas, used as a defence, it is as conclusive to every intent as a domestic judgment."⁵⁹ The same view has been expressed in some later decisions also.⁶⁰

210. Mr. Justice Story in his Work on the Conflict of Laws, speaking of the rule of the English Courts, says⁶¹: "The well established present English doctrine is that a foreign judgment is only *primâ facie* evidence in England upon the question whether the foreign court had jurisdiction of the subject-matter or of the person of the defendant, or whether the judgment was regularly obtained; but that it is conclusive upon the defendant, so far as to prevent him from alleging that the promises upon which it was founded, were never made, or were obtained by fraud of the plaintiff In the former case (suits

⁵⁷ 23 Beav. 149.

⁵⁸ Bl. Jud. 948.

⁵⁹ *Buttrick v. Allen*, 5 Am. Dec. 105.
Williams v. Preston, 20 Am. Dec. 170.
— v. Dawson, 39 Am. Dec. 430.

⁶⁰ *Middlesex Bank v. Butman*, 20 Mo. 19.

Taylor v. Barron, 64 Am. Dec. 281.

Rankin v. Goddard, 60 Am. Dec. 710.

⁶¹ *Ibid* 7th Edition, p. 606.

brought by a party to enforce a judgment) it is often urged that no sovereign is bound *jure gentium* to execute any foreign judgment within his dominions; and, therefore, if execution of it is sought in his dominions, he is at liberty to examine into the merits of the judgment, and to refuse to give effect to it if, upon such examination, it should appear unjust and unfounded. He acts in executing it upon the principles of comity, and has therefore the right to prescribe the terms and limits of that comity. But it is otherwise, it is said, where the defendant sets up a foreign judgment as a bar to proceedings, for if it has been pronounced by a competent tribunal and carried into effect, the losing party has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy; and the other party is not to lose the protection which the former judgment gave him. It is then *res judicata*, which ought to be received as a conclusive evidence of right, and the *exceptio rei judicatæ*, under such circumstances, is entitled to universal conclusiveness and respect. The distinction has been recognized in several cases in the United States also."

Similarly, Mr. Wharton, in his Work on the Conflict of Laws⁶² says: "Jurists of all nations have recognized the distinction between a foreign judgment when offered as a plea in bar by the defendant, and a foreign judgment when presented to a domestic court by the plaintiff in order to obtain execution. To the foreign judgment when offered by a plaintiff as ground-work for domestic process, the defendant, on the strictest view, can plead the incompetency of the court, or the gross injustice of the judgment, on international principles, while in the continent of Europe, the execution of this judgment is a matter of executive discretion, more or less liberally exercised. It is otherwise, however, when the defendant to a domestic suit pleads that the plaintiff, on the same cause of action, has prosecuted him or his property to judgment in a foreign land. It would seem to be a principle of natural equity that the plaintiff having thus elected his tribunal, be it competent or incompetent, and having pressed the suit to judgment upon the defendant's appearance, should be estopped *pro tanto* from vexing the defendant elsewhere, on the same demand." In justification of the distinction, Mr. Herman says:⁶³ "There is a wide distinction between the effect of a foreign judgment when the plaintiff seeks to make the judgment the basis of a judgment in another sovereignty than that in which the

⁶² 1 Fed. P. 815.

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⁶³ Herm. Comm. 596.

judgment was rendered, and when the party against whom it was rendered seeks to avail himself of such prior foreign judgment as a defence to an action upon the original cause as a plea in bar *exceptio rei judicatæ*. A foreign judgment when presented to a domestic court by the party in whose favor it was rendered, as the ground-work for a domestic judgment, may be impeached by the party against whom it was rendered, upon the ground of the incompetency of the court rendering it for want of jurisdiction or the gross injustice of the judgment on international principles. But when the party against whom the judgment is rendered pleads that the plaintiff on the same cause of action has already prosecuted him or his property to judgment in a foreign land, it is a principle of natural justice that the plaintiff having thus elected his tribunal, be it competent or incompetent, and having pressed the action to judgment upon the defendant's appearance, should be estopped *pro tanto* from vexing the defendant elsewhere on the same cause of action."

In Scotland, Lord Kames justified the distinction on another ground, and in his *Work on Equity*,⁶¹ said: "A foreign decree, which by dismissing the claim, affords an *exceptio rei judicatæ* against it, enjoys a more extensive privilege. We not only presume it to be just, but will not admit any evidence of its being unjust. A decree dismissing a claim may, it is true, be unjust, as well as a decree sustaining it. But they differ widely in one capital point; in declining to give redress against a decree dismissing a claim, the court is not guilty of authorizing injustice; even supposing the decree to be unjust, the utmost that can be said is that the court forbears to interpose in behalf of justice. But such forbearance instead of being faulty, is highly meritorious in every case where private justice clashes with public utility. The case is very different with respect to a decree sustaining the claim; for to award execution upon a foreign decree, without admitting any objection against it, would be, for aught the court can know, to support and promote injustice." Even Mr. Pigott, as a result of all the cases, says—"that whereas in enforcing a judgment defences will certainly be admitted, though there is much uncertainty as to what those defences may be; in recognizing a judgment the bar is held to be absolute, that is, no reply will be allowed, excepting one putting in issue the existence of the record."⁶²

211. This distinction involves an essential inconsistency. If a foreign judgment, when attempted to be enforced, may be impeached, a suit must of course be held to lie in a foreign country on the original cause of action, which will thus not be allowed to merge in the judgment.⁶⁶ As a fact, it is now held that a foreign judgment does not operate as a merger of the original cause of action; and that in a foreign country a suit may always be brought on the original cause of action or on the judgment.⁶⁷ Thus Mr. Westlake, in his *Work on Private International Law*, says:⁶⁸ "It cannot be said of the claim for which a foreign judgment has been given that *transit in rem judicatum*; the plaintiff may sue in England on the original cause as well as on the judgment until the latter is satisfied, and it is common in the cases before the Judicature Acts to find counts on each in the same declaration." Mr. Black, after observing that that doctrine prevails in England, and (excepting Louisiana) in the United States, says that—"the judgment is not pleadable in bar of an action brought in England for the same cause."⁶⁹

In *Eastern Townships Bank v. Beebe*,⁷⁰ it was held by the Supreme Court of Vermont that—"The original cause of action is not so merged by that (a foreign) judgment, that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered," and the Court further observed that—"the books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the

d In the case cited, Tindal, C. J., after observing that the ground on which a judgment recovered in an English Court bars the plaintiff from a further action is, that the original nature of the debt or damage is transferred into a higher remedy, the power to take immediate execution, and that the Vice-Admiralty Court of the Colony of Sierra Leone, which passed the foreign judgment is not a Court of Record, said: "If the judgment has not altered the nature of rights between the parties, we want some authority to see that the plaintiff is to be deprived of the remedy which every subject has of bringing his action in the courts here for the damages he has sustained. It appears to me he has his option, either to resort to the original ground of action, or to bring an assumption on the judgment recovered." He referred in support of his view to the case of *Hall v. Odber*,⁷¹ in which Bayley, J., had said: "This being only a foreign judgment, did not merge or extinguish the plaintiff's simple contract-debt; which can only be done by converting it into a debt of a higher nature; it is only evidence of the debt." In *Bank of Australasia v. Harding*,⁷² Wilde, C. J., said: "The judgment may be a merger in the Colony, because it is conclusive there: but when sued on in another country, it is only *prima facie* evidence of the debt."

⁶⁶ 3 Sm. L. C. 830.

Story Conf. Laws, 823.

⁶⁷ *Smith v. Nicolls*, 5 Bing. N. C. 306.

⁶⁸ P. 354.

⁶⁹ Bl. Jud. 1016.

⁷⁰ 38 Am. Rep. 663.

⁷¹ 11 East, 126.

⁷² 9 C. B. 661.

same original cause of action." "On the other hand, to admit the plea of *res judicata* in any form," says Mr. Pigott, "implies that there is a merger of the cause of action in the judgment pronounced upon it For assume the doctrine of non-merger to be maintainable. And first suppose judgment for the plaintiff abroad, and an action brought on the original cause of action here; the defendant is then compelled to answer the case on this original cause of action independently of that on the foreign judgment: that is to say, to the former he may not plead in any way *res judicata*: the judgment already given deciding the dispute between the parties in the plaintiff's favour, is treated as non-existent and as not having affected this dispute, *quoad* their relations in this country. Again, suppose judgment for the defendant abroad. If the cause of action merged in the judgment, *a fortiori*, the alleged cause of action is; but conversely, if the cause of action is not merged in the judgment, neither can the alleged cause of action be merged. Therefore, that judgment must also be treated as non-existent, and as not having affected the dispute, *quoad* the relations of the parties in this country: and therefore the defendant must answer the case on the alleged original cause of action; that is to say, he may not plead in any way *res judicata*." ⁷³

The importance of this will appear particularly when it is "borne in mind that, although *res judicata* is usually treated as the defence to an action on a cause of action already adjudicated upon, yet the principle involved in it is equally applicable where an action is brought upon the adjudication: that is to say, the question in dispute is treated as already decided. But an action on a home judgment, execution being the appropriate remedy to enforce obedience to it, is of rare occurrence; and being superfluous is not regarded with any favour by the law; therefore it is that, with regard to English decisions, the doctrine of *res judicata* has come to be considered as solely appertaining to the case of the defendant. But with regard to foreign decisions, action being brought upon them as well as defences raised in respect of them, it is obvious that whatever principle is applicable to them, whether it be *res judicata* absolutely or in some modified form, that principle should govern their reception equally in both cases. This seems to have been lost sight of in the cases in which the point has been discussed." ⁷⁴

⁷³ Pig. Fr. Jud. 38.

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⁷⁴ Pig. Fr. Jud. 35.

Mr. Black says that—"the doctrine is sustained, neither by principle nor by the best modern decisions. For if carried to its legitimate conclusions, it would produce consequences which the courts have distinctly refused to recognize. If one who has successfully defended a suit brought against him in a foreign court may set up the judgment as a conclusive bar to an action against him here, it ought to be equally true that he could rely implicitly upon a judgment against him in the foreign court. In other words, the foreign judgment should be held to merge the original cause of action. But then, if the cause of action is merged in the foreign judgment, it is clearly necessary to hold that judgment final and conclusive when made the basis of a suit. But the courts do not as yet hold that the cause of action is merged in the foreign judgment. There is an inconsistency here which tells equally in both directions. But it is sufficient for our present purpose to point out that it effectually destroys the reasonableness of the distinction taken by Chief Justice Eyre."⁷⁵

212. The distinction was open to grave objections and could not have a long life. It lost a great deal of its force with the growth of the doctrine of obligation, which dissipated the view as to a foreign judgment being merely *prima facie* evidence. And that view may now be looked upon as quite exploded.* Thus Blackburn, J., in *Godard v. Gray*,⁷⁶ said: "There is no case decided on such a principle, and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers. Indeed it is difficult to understand how the common course of pleading is consistent with any notion that the judgment is only evidence. . . . If the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter-

* It has even been attempted to show that no such distinction was ever recognized; thus Dr. Bigelow, referring to the principal cases in which the distinction was maintained, says: "These are all the English cases of importance which favor the rule that the judgments of courts of other countries are inconclusive; and it will be observed that in none of them is there an express and authoritative adjudication of the point. . . . These cases do not decide that the merits of a valid foreign judgment may be enquired into; they merely hold that the judgment will not be enforced if it appear that the foreign court had not acquired jurisdiction of the case."⁷⁷ Some of these cases⁷⁸ were collected and explained by Blackburn, J., in delivering the opinion of five of the judges in *Castrique v. Imrie*, as not justifying it. The question in that case was in regard to a judgment *in rem*, but the language of the judgment seems to be equally applicable to a judgment *in personam* so far as regards the parties to it or those claiming under them.

⁷⁵ Bl. Jud. 988.

⁷⁶ L. R. 6 Q. B. 149.

⁷⁷ Big. Estop, 259.

⁷⁸ E. G. Novelli v. Rossi, 3 B. & Ad. 757.
Simpson v. Fogo, 1 H. & M. 195.

evidence negating the existence of that original cause of action." This is the view taken of the practice of the English Courts by the High Courts in India. Thus Plowden, J., in *Bikrama Singh v. Bir Singh*,⁷⁹ expressed it as his "opinion that the general tendency of the later decisions is in favor of the conclusiveness of a foreign judgment, and against its being open to examination on the merits, provided that the court which pronounced it was of competent jurisdiction, and that the person against whom it is sought to be enforced had an opportunity of defending himself before that court." In the English Courts both of law and equity, it appears to be settled now that an action is maintainable upon a foreign judgment *in personam*; and in an action at law founded upon such a judgment, the judgment is viewed not merely as *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie* to a legal obligation to obey that judgment and pay the sum judged.⁸⁰

And the change of judicial opinion in England had a corresponding effect in the United States. Thus the Arkansas Supreme Court said in *Glass v. Blackwell*⁸¹—"that when the English Courts began to doubt its soundness, the current of American authority began to change, and since the English *dicta* were repudiated at home, their doctrine has been but little regarded here A judgment, whether foreign or domestic, raises a binding obligation to pay the sum awarded by it, and the presumption as to its conclusiveness should follow the law of the *forum* in which the proceedings were had It is not the policy of the law to encourage litigation, and where a court of competent jurisdiction, having the parties legally before it, has adjudicated the merits of their case, every reason favours holding them bound by the adjudication, wherever the judgment may be called in question, if there has been no fraud practised in obtaining it. This is now the accepted rule." Similarly, the New Hampshire Supreme Court said in *Rangely v. Webster*,⁸² that "to maintain the position that in the case of an action upon the judgment, the judgment is void, and may be so treated, but that when the action is upon the original demand, the same judgment is valid, is to maintain that the form and manner of the action adopted determine the charac-

⁷⁹ 1888 L. R. No. 191.⁸⁰ *Godard v. Gray*, L. R. 6 Q. B. 139.⁸¹ 48 Ark. 50.⁸² 11 N. H. 209.

ter of the former judgment, its validity or invalidity, instead of the facts and circumstances attending its recovery." It appears to be generally held now even by the American courts, that when a foreign judgment comes incidentally in question, as where it is the foundation of a right or title derived under it, and the like, it is conclusive.⁸³ "There can be but little doubt," says Mr. Herman,⁸⁴ "that payments made, powers exercised, or sales effected, or other final acts accomplished under the direction of a foreign tribunal, may be valid, when the decree under which they take place is erroneous or even void. . . . Whenever a foreign judgment comes incidentally in question it is as conclusive as where it is used as the foundation of a title derived under it, or to show that the subject-matter of the action has once passed in *rem judicatum*, or is introduced by a guarantor as a defence in order to show that his principal was not liable, or is relied on by the garnishee in a foreign attachment for the purpose of protecting himself against the claims of his original creditors, or by the underwriter in a policy of insurance to show a breach of warranty on the part of the insured, or by a party to justify himself for acts done by virtue of it." Mr. Black says: "The settled rule in England, at the present day, and the strong tendency of the modern American cases, is to regard foreign judgments as equally conclusive and binding whether they are used as a cause of action or presented as a defence."⁸⁵

213. Thus the general doctrine of the courts in England and the United States, at present, is that a foreign judgment of a court having jurisdiction, is subject to certain limitations, conclusive in our courts, both for attack and defence, both as a ground of action and as a plea. There is a considerable conflict, however, as to the exact character of these limitations, and a great deal of the confusion in regard to that is due to the frequent attempt of the judges to specify in cases involving any particular limitation a greater or less number of other limitations without that regard to accuracy which would be required in the case of the particular limitation in issue. "Judges when they have been called upon to decide any point arising on the question of foreign judgments, have invariably thought it necessary to

⁸³ *Stephens v. Gaylord*, 11 Mass. 266.
Cummings v. Banks, 2 Barb. 602.
Bank v. Beebe, 38 Am. Rep.

⁸⁴ *Herm. Comm.* 594.
⁸⁵ *Bl. Jud.* 989.

include the whole subject in their remarks, and amongst other things to give a list of defences, which has not always been accurate and seldom exhaustive."⁸⁶ It was observed in *Bank of Australasia v. Nias*,⁸⁷ that a foreign judgment was examinable and was only *prima facie* evidence of the debt, and Lord Campbell, C. J., in the judgment of the Court said: "It is open to the defendant to show that the foreign court had not jurisdiction on the subject-matter of the suit, or that he was never summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained." In *Reimers v. Druce*,⁸⁸ Sir John Romilly, M. R., said—"that a foreign judgment, sought to be enforced in this country, was examinable for the following purposes, and for these only, namely—1st, for the purposes of showing that the defendant abroad had no notice of the suit, and never knew of it until the judgment was given; 2ndly, that it was obtained by fraud; 3rdly, that the court which pronounced the judgment had no jurisdiction; 4thly, that there was error on the face of the judgment, either of law or fact; lastly, that it was contrary to the law which it professed to administer, but which, with reference to the merits of the case, the facts and other matters, was absolutely conclusive between the parties." Similarly, Fry, J., observed in *Rousillon v. Rousillon*,⁸⁹ that—"the courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained, where he was resident in the foreign country when the action began; where the defendant, in the character of plaintiff, has selected the *forum* in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the *forum* in which the judgment was obtained, and possibly, if *Bicquet v. MacCarthy*⁹⁰ be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." Mr. Justice Story said: "It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction; or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular and bad by the local law.—*Fori rei judicatæ*. To

107.
16 Ad. & El. N. S. 717.
23 Beav. 150.

89 14 Ch. D. 371.
90 2 B. & Ad. 112.

such an extent the doctrine is intelligible and practicable. Beyond this the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits."⁹¹ This observation was cited by Lord Selborne in *Ochsenbein v. Papelier*,⁹¹ with approval. The extent to which these and other limitations have been recognized judicially by the courts will be discussed in speaking of the conditions prescribed by the Indian rule relating to foreign judgments.

214. There is an entire unanimity, however, that when-
 Foreign judgments to receive recognition must be of courts of competent jurisdiction. ever a judgment is rendered without jurisdiction it is void, and is treated as a nullity, whether it comes directly or collaterally in question. The correctness of this rule, in its broad form, is never denied in any country even in regard to domestic judgments, but in regard to foreign judgments, the rule receives a much wider and stricter application. There is no conclusive presumption allowed in any case in support of a foreign court's jurisdiction, and extrinsic evidence may always be admitted to rebut the recitals by a foreign court even as to the jurisdictional facts. In fact, so strict is the law, that in the United States, a judgment even of a court in a sister state may be impeached on the ground of want of jurisdiction, though the Constitution provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and in pursuance of the authority given to the Congress "to prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof," the Congress has provided a form of authentication, and enacted "that the said records and general proceedings shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are, or shall be taken." Thus the United States Supreme Court in *Williamson v. Berry*⁹² said: "Thus jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings;" and "the rule prevails whether the decree or judgment has been given in a Court of Admiralty,

Chancery, Ecclesiastical Court, or Court of Common Law, or whether the point ruled has arisen under the law of nations, the practice in chancery, or the Municipal laws of states."

The Illinois Supreme Court in *Smith v. Smith*,⁹³ said: "All agree that a judgment rendered without jurisdiction is utterly void. It is not a judgment; it is a blank, as if it had not been written. It is not a record; and consequently is not admissible in evidence on a plea of *nul tiel record*." The New York Supreme Court in *Kerr v. Kerr*⁹⁴ said: "Want of jurisdiction is a matter which may always be interposed against a judgment, when sought to be enforced, or when any benefit is claimed for it, the want of jurisdiction either of the subject-matter or of the person of either party renders a judgment a mere nullity." "The Constitutional clause," as pointed out by Mr. Wells, "applies only so far as the court has jurisdiction. In every particular, where this is wanting, the judgment rendered is a nullity."⁹⁵ The California Supreme Court in *Kane v. Cook*,⁹⁶ said: "To the extent in which jurisdiction existed, will faith and credit be given to the judgment in this state, and no further. Thus, if personal property of the defendant had been sold under this judgment, in New York, and the purchaser had brought the property in this state, he would be protected against a claim of the defendant. The judgment and sale thereunder would sustain his title. But for all the purposes of establishing a personal claim against the defendant, it is a mere nullity, and it makes no difference whether valid and in conformity with the course and practice of the Court where rendered, or otherwise." And even a court of a sister state will not be deemed of competent jurisdiction, unless it has jurisdiction over the parties as well as over the cause.⁹⁷

It has, sometimes, been held that the decision of a foreign court in favor of the existence of its jurisdiction is binding against the parties in other countries also. Thus Draper, J., in *Warren v. Kingsmill*⁹⁸ said: "We are bound to assume that the course of action was of the proper jurisdiction of the foreign court, for they have entertained and adjudicated upon it. Nor can we assume it to be beyond their jurisdiction, because the alleged trespass took place without the territory over which that jurisdiction extended; for if we

⁹³ 17 Ill. 422.

⁹⁴ 41 N. Y. 272.

⁹⁵ Wells Res. Jud. 460.

⁹⁶ 2 Cal. 455.

Bessell v. Briggs, 6 Am. Dec.

Jacobs v. Hull, 12 Mass. 24.

Kibbe v. Kibbe, Kirby, 12.

3 Q. B. Up. Can. 407.

assume that fact to have been known to them, their having given judgment must be taken *prima facie* as proof that by their law they had jurisdiction in such a case." The weight of authority is however against that view. It is generally held that the courts of other States are competent to see whether the jurisdiction did really exist. In the United States it has, after some conflict of opinion, become settled that recitals of jurisdiction in the judgments of the courts of even the sister states are not conclusive.⁹⁹ Jurisdiction is presumed, but that presumption may be rebutted. The Constitutional clause does not "prevent an inquiry into the jurisdiction of the Court in which the original judgment was rendered, nor an inquiry into the rights of the State to exercise authority over the parties or the subject-matter, nor an inquiry whether the judgment is founded on or impeachable for fraud; and that such a judgment may be inquired into, although the record states facts giving the Court jurisdiction. Such record is never conclusive as to recitals or statements of jurisdiction."¹⁰⁰

The leading decision on the point is that in the case of *Thompson v. Whitman*,¹ in which even extrinsic evidence was received to show that the cause of action did not accrue within the jurisdiction of a court in a sister state, and that court therefore had no jurisdiction and its decision was void. The Supreme Court of the United States, after reviewing a number of cases bearing on the point, said: "It must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court. But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent an inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. . . .

Knowles v. Gaslight Co., 19 Wall. 58.
Pennoy v. Norf., 95 U. S. 714.
Wright v. Andrews, 130 Mass. 149.
Kingsbury v. Yniestra, 59 Ala. 320.
Napton v. Leaton, 71 Mo. 358.

v. Crawford, 26 Am. Rep. 589.
⁹⁹ *Noyes v. Butler*, 6 Barb. 613.
Kerr v. Kerr, 41 N. Y. 275.
 18 Wall. 457.

On the whole, we think it clear that "the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." Mr. Herman says: "It is well settled by great weight of authority, that the want of jurisdiction of the court rendering the judgment can be shown by evidence, notwithstanding the recital, in such judgment, of the existence of the controverted facts."² A person sued on the judgment of a foreign court, if not a citizen of the state in which that judgment was delivered, has often been allowed to show that the court did not have jurisdiction over him, no matter what jurisdictional findings or recitals it placed in its record." It was said in *Thorn v. Salmonson*³ that, "although the recitals contained in the judgment, that service was made, raise a strong presumption in favor of the jurisdiction and of the truth of the recitals, yet the plaintiff may show by extrinsic evidence that no service was actually made. Strong proof will be required to overthrow the presumption of jurisdiction raised by the recitals; but if it is clearly shown, that the defendant was not served with process, and did not voluntarily appear or submit to the jurisdiction of the court, the recitals are of no value." In *Starbuck v. Murray*,⁴ the New York Supreme Court speaking of the record, said: "It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the Court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declared to the defendant: The paper declared on is a record, because it says you appeared, and you

² Herm. Comm. 605.
³ 37 Kan. 441.

⁴ 21 Am. Dec. 172.

appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction."

On the same principle, in suits on foreign judgments founded upon an appearance of defendant by an attorney, an answer that the attorney appeared without authority is always considered a good defence.⁵

215. The question of the existence of the jurisdiction of a foreign court has to be examined primarily with reference to the law of the country in which that court may be situate, and from the Government whereof it may derive its judicial powers. terminated with reference to the laws of its own country.

Thus in *Castrique v. Imrie*, Lord Chelmsford, speaking of the legal effect in England of a judgment of a French court in a proceeding *in rem* said, that in such cases the question will be—"first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the Sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against the whole word."^{5a} This rule is recognized in its broadest extent in Italy, where M. Constant after observing that *c'est d'après la loi du lieu où le jugement étranger a été rendu qu'il faut apprécier si le tribunal était compétent*, says: *Le fait que le tribunal étranger était compétent d'après la loi italienne ne serait, pour la cour saisie de l'instance en exequatur, qu'une considération secondaire; la raison décisive, c'est que le juge*

⁵ *Aldrich v. Kinney*, 10 Am. Dec. 151.
Welch v. Sykes, 44 Am. Dec. 689.
Sherrard v. Nevius, 52 Am. Dec.
Baltzell v. Noeler, 63 Am. Dec.
Gilman v. Gilman, 80 Am. Rep.

Wright v. Andrews, 130 Mass. 149.
Napton v. Leaton, 71 Mo. 358.
Citizens' Bank v. Brooks, 28 Fed. R. 21.
^{5a} 4 H. L. 445.

était compétent d'après la loi du pays ou le jugement a été prononcé. . . . le principe que la compétence est régie par la loi du tribunal qui a rendu le jugement nous paraît devoir être absolu d'après la loi italienne ; c'est d'ailleurs le plus raisonnable en théorie et le plus facile à appliquer, souvent même le seul possible, si l'on veut que l'exécution des jugements étrangers soit une réalité.^{5b}

As a general rule, each State can frame any laws it may consider proper for the administration of justice in its courts, and to its subjects. The first and most general maxim or proposition, says Mr. Justice Story in his work on the Conflict of Laws, is that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every State affect and bind directly all property whether real or personal within the territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it. A State may therefore regulate the validity of contracts and other acts done within it, the resulting rights and duties growing out of those contracts and acts, and the remedies and modes of administering justice in all cases calling for the interposition of its tribunals to protect and vindicate and secure the wholesome agency of its own laws within its own dominions." The same doctrine is either tacitly or expressly conceded by every jurist who has discussed the subject at large. Even protected Native States in India have that power inherent in them. The Faridkote State has been held by the Punjab Chief Court in *Bikrama Singh v. Bir Sing*,⁶ to have that power on grounds applicable to all the other Native States.^(f)

(f) Plowden, J., in his judgment in this case said,⁷ "The truth seems to be, as regards this and other States in India which are similarly circumstanced, that they have as States all such attributes of Independent States as are compatible with their conditions of protection and dependence, and are consistent with the terms of any compact subsisting between them and the Protecting Power, and with the established course of dealing between them and that Power. In the courts of law, at least of that Power, it seems to me almost a matter of necessity that these States should, in respect of such questions as arise in this case, be regarded and treated as on a footing similar to that of Independent States, though not exactly identical by reason of the relations existing between them and the British Crown. When a question arises as to the authority of the State to legislate and to constitute Courts of Justice, as to the jurisdiction of the Courts of the State, and the effect of the judgments of such courts within the State and beyond it, there seems no alternative for a Court, as soon as it is conceded that there is a State, save to be guided by the principles of International law. . . . It seems inaccurate to describe the Paramount Power, as a source of those rights in a Protected Dependent State, which are inherent in all States, as such ; and when any such right alleged to exist in a Protected

216. *The courts of other countries, however, are not bound, and generally not inclined, to recognize the jurisdiction as sufficient, when it is exercised against the general principles of international law. No government can, even by express legislation, appropriate to itself a jurisdiction over non-resident strangers in excess of what is permitted usually by the rules of international law.* "Jurisdiction to be rightfully obtained," says Mr. Herman, "must be either upon the person of the defendant, being within the territory of the sovereign, where the court sits, or else his property must be within such territory, otherwise no sovereignty can be exerted upon the principle, *Extra territorium jurdicenti impune non paretur*, and should the law making power of a nation or State expressly grant to its judicial tribunals jurisdiction over persons or property not within its territory, such grant would be treated elsewhere as a mere usurpation, and all judicial proceedings under it utterly void. No sovereignty can extend its own process beyond its own territorial limits, to subject either persons or property to its judicial decisions." Similarly Dr. Story says:—"It is true that nations generally assert a claim to regulate the rights and duties and obligations and acts of their own citizens, wherever they may be domiciled. And so far as these rights, duties, obligations, and acts afterwards come

State is disputed, the point for inquiry seems to be not whether the Paramount Power has expressly recognized its existence, but whether the right claimed has been lost or modified. Now the right of jurisdiction is one of the rights incident to Independence. . . . It cannot be inferred from the mere fact that the Faridkot State has submitted itself to the British Crown, that its legislative authority is impaired in respect to prescribing rules for the administration of Civil Justice by its own tribunals, such submission being perfectly consistent with the retention of this power. The first article (of the Sanad) confirms and guarantees to the Raja, all the powers, and authority, civil, criminal and fiscal at present exercised by the Raja. The first article appears to include legislative authority in Civil matters, including the jurisdiction of State tribunals. Presumably such authority is vested either in the Raja, as Ruler of the State, or in the British Government, and it must necessarily have been frequently exercised in the past 20 years. No attempt has been made to show that it has been exercised by the British Government, whereas there is evidence that it has been exercised by the Raja. If it be held, as I consider it must be, until the contrary is shown, that the Raja had power to prescribe rules for the administration of justice by the State tribunals it seems beside the mark to inquire whether in past times it was the practice of the State to claim and to exercise jurisdiction by its courts in Civil matters over aliens, resident or non-resident. In this case we are concerned only with existing rules, not rules that have been superseded. There can be very little doubt that before the days of British Protection the Raja of the time regulated the practice of his tribunals as he thought fit. This is the important point, and not the rules which were prescribed in those days. Holding the Raja to have the power claimed in his behalf, it follows that the circumstance that the State is a Protected State, does not affect the validity of the rules prescribed by him. They have the same effect in his own territory as rules on the same subject, prescribed by any of the great nations of Europe, have in their respective territories, or by the British Government have in British India."

under the cognizance of the tribunals of the sovereign power of their own country either for enforcement or for protection or for remedy, there may be no just ground to exclude this claim.⁸ But when such rights, duties, obligations, and acts come under the consideration of other countries, and especially of the foreign country where such citizens are domiciled, the duty of recognizing and enforcing such a claim of sovereignty is neither clear, nor generally admitted.”⁹ In *Buchanan v. Rucker*,¹⁰ Lord Ellenborough, speaking of the local law of the Island of Tobago, which was relied upon in support of a constructive service of the summons on a non-resident foreigner, asked : “ How could that be obligatory upon the subjects of other countries ? Can the Island of Tobago pass a law to bind the rights of the whole world ? Would the world submit to such an assumed jurisdiction.” Similarly, Chief Justice Best in *Douglas v. Forrest*¹¹ said : “ To be sure, if attachments issued against any persons who were never within the jurisdiction of the Court issuing them, could be supported and enforced in the country in which the person attached resided, the Legislature of any country might authorize their Courts to decide on the rights of parties who owed no allegiance to the Government of such country, and were under no obligation to attend its courts or obey its laws.” In *Ex parte Blain*,¹² Lord Justice James said that English law had a right to say to any foreigner, “ If you make a contract in England, or commit a breach of a contract in England under a particular Act of Parliament, a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country. If a foreigner being served with a writ under the provisions of the Judicature Act, does not choose to appear, and the Legislature said, ‘ If you do not appear you will commit a default in that way, and we will give judgment against you.’ whether that judgment would under such circumstances, be recognized by foreign tribunals, as being consistent with International law and the general principles of justice, is a matter which must be determined by them. It is not consistent with ordinary principles of justice or the comity of nations that the Legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their

⁸ *Deck v. Deck*, 2 Sw. and Tr. 90.

⁹ *Story's Conf. Laws*, 735.

¹⁰ 9 East.

⁴ Bing. 703.

¹² Ch. D. 51

jurisdiction. Of course, if a foreigner has come into this country and has committed an act of bankruptcy here, he is liable to the consequences of what he has done here; but, in the absence of express legislative provision, compelling me to say that the Legislature has done that which, in my opinion, would be a violation of International law, I respectfully decline to hold that it has done anything of the kind."

Thus as a general principle a judgment by a foreign court not properly constituted is a nullity, though the presumption is in favor of its being properly constituted.¹³ In *Robinson v. Bland*,¹⁴ the judgment of a French Court of Marshalls, a 'Court of Honor' with regard to the payment of a gaming debt, was disregarded as being the sentence of a 'whimsical and fantastical court,' resembling the Lawless Court held at Rochford in Essex. And in *Gage v. Bulkley*,¹⁵ the judgment of a French Commissary Court for the same cause being pleaded in bar, the Court refused to recognize it, because it was the sentence, not of a judicial tribunal, but of a Court of a purely political nature to determine disputes that might arise in relation to French actions. In *Taylor v. Ford*,¹⁶ Blackburn, J., said: "It may, of course, be said that the International law on any subject can only be that law which is common to the laws of all nations, and that whatever is in excess of that is a violation of International law: and that, therefore, in the case of assumed jurisdiction, only those instances of it can be called part of the law of nations which are recognized and adopted by all States. This is sound: but we venture to think, more especially as this law in every State is liable to frequent alteration (as the recent changes in our own rules testify) that the larger doctrine which we have advocated is also sound and must ultimately prevail, that, not the common instances in which the principle is adopted, but the principle itself now forms part of International law; and that till a *consensus* of opinion is arrived at, the instances in which it is so adopted must in every case be left to the discretion of the several States."

Practically, the question has to be left to the discretion of the Courts of the country in which the judgment is brought forward to receive effect, and the Courts of that country not

¹³ Herm. Comm. 379.
¹⁴ 1 W. Bl. 234, 236.

¹⁵ 3 Atk. 214.
¹⁶ 22 Eng. W. R. 47.

seldom adopt their own law as a measure of the validity of the jurisdiction exercised by the foreign court. A very notable illustration of this is furnished by the German law, where the Civil Procedure Code has enacted that a foreign judgment to receive an *exequatur* for its execution there should have been rendered by a tribunal competent according to the German law. The German courts, as observed by M. Constant, require that "*le juge allemand doit examiner la compétence du tribunal étranger, non seulement au point de vue de la question de savoir si le juge étranger a fait des principes reconnus, en matière de compétence, une application saine et conforme aux règles posées par le droit allemand; mais encore à l'effet d'apprécier si les faits, à raison desquels il a été fait application de ces principes, étaient de nature à justifier l'attribution de la compétence au juge étranger et si ces faits sont réellement prouvés.*"¹⁷

Thus Plowden, J., in his judgment in the case of *Bikrama Singh v. Bir Singh*,¹⁸ said: "The principle already set out (*Godard v. Gray*) seems to require that the expression should include competency of jurisdiction in the foreign court according to its own laws. Otherwise it would be difficult to affirm that the judgment created a legal obligation in the foreign State, or to deny that its performance might be excused elsewhere. But if this be so, is the expression to be *limited* to competency of the foreign court according to its own laws? It is clear that the meaning of the expression under notice is to be determined by the laws of this country, and there is no maxim of International jurisprudence which requires that the question of competency of the court pronouncing a judgment should be determined in foreign court called upon to enforce the judgment, solely with reference to the rules of jurisdiction prescribed by its own laws for the original court. 'Civilized nations differ widely as to the rules of jurisdiction. Naturally, therefore, when called upon to enforce foreign judgments each tries by its own maxims the competence of the courts which pronounced them. To do otherwise would be to license every foreign state to draw to itself all causes which it pleased; nor can any Judge be required to enforce a duty not imposed upon the defendant by an authority held lawful in his own tribunal.'¹⁹"

¹⁷ Con. Exe. Jug. Etr. 86.
¹⁸ 1889 P. R. No. 191, p. 507.

| ¹⁹ West, Priv. Inter. :

cient ground of competence for enforcing such a judgment in England.²⁰ In *Schibsby v. Westenholz*,²¹ the contract sued upon was not made in France, and the defendants had been served with the citation through the French Consulate in London, but had not entered any appearance. The Court of Queen's Bench held that, since the defendants had never owed any allegiance to France, or made a contract in that country, or taken any part in the proceedings, the foreign judgment should not be enforced against them. Blackburn, J., in his judgment in the case, said: "The question we have now to answer is, can the empire of France pass a law to bind the whole world? We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner, being sued on in a court of the United States, the question for the court of the United States would be, can the island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No." These observations were quoted with approval and acted upon in *Hinde v. Ponnath Brayan*,²² by Innes and Muttusami Ayyar, J.J., who said that, "the cause of action in the suit in the Mahé Court did not arise at Mahé, the defendant in the French Court did not reside at Mahé, and there appears no circumstance in the case which in a proper view of International law could give the French Court jurisdiction or impose upon the defendant a duty to obey the judgment." Similarly, Sir Charles Turner, C. J., and Muttusami Ayyar, J., in *Nallatambi Mudaliar v. Ponnusami*²³ said: "It will be noticed that it is an indis-

²⁰ Vide p. P. 347.
²¹ L. R. 6. Q. B. 155.

| ²² I. L. R., IV Mad. 359.
²³ I. L. R. 11 Mad. 403.

pensable condition that the foreign court should have jurisdiction over the defendant. It has jurisdiction over the defendant if he was, at the time suit was commenced, a subject of the foreign country, or if he was at that time domiciled or temporarily resident therein; and in respect of an obligation contracted in a foreign country, it would possibly be held that the Courts of that country have jurisdiction over a foreigner, though he may not be domiciled and may have left the country before suit brought; and in respect of the transactions of a joint stock company formed for the purpose of carrying on business in a foreign country, the courts of that country may, under certain circumstances, have jurisdiction over a member of the Company, though he may never have resided therein nor owe allegiance thereto. . . . The 14th article of the *Code Civil* permits a French citizen to cite before a French Court a foreigner, even though, not resident in French territory, to enforce a contract whether made in French or in foreign territory. The Municipal law of France has force only within its own territory. A judgment passed under that law can be enforced in British Courts only in virtue of principles of International law which have extra-territorial operation. British Courts then are not bound to enforce in all cases judgments passed by French tribunals against foreigners on contracts made out of French territory." In *Appasami Poulle v. Parry*,²⁴ Mr. Justice Muttusami Ayyar said, "the test of jurisdiction is not the law of France which is only territorial in its operation, but some recognized principle of International law which has extra-territorial operation."

218. It is clear, upon principle, that if a person, as plaintiff, "selected the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."²⁵ In *Novelli v. Rossi*,²⁶ it was held that a judgment of a French court against an Englishman who brought a suit there would be binding on him in an English court, even though given on a misinterpretation of the English law upon the subject. In *Nallatambi Mudaliar v. Ponnusami*,²⁷ Sir Charles Turner, C. J., and Muttusami Ayyar, J., said :—"In suing as a plaintiff in the court of a country to which he owes no allegiance, he has voluntarily submitted to its jurisdiction,

²⁴ V. L. J. 189.²⁵ *Schibasy v. Westonholz*, L. R. 6 Q. B. 161.²⁶ 2 B. and Ad. 757.²⁷ L. R., II Mad.

and he cannot afterwards object to the validity of the judgment of the court on the ground that it had no jurisdiction over him." There is a difference, however, in this respect, between the position of the plaintiff and that of the defendant. The latter "is summoned to the foreign court, and therefore to a certain extent his appearance there is under compulsion, except that he has, where judgment has been given for the plaintiff, rendered himself liable to the suit by his own act ; but the plaintiff's appearance there is so far voluntary, that being presumably at arms' length from his opponent and his only remedy being at law, he must perforce choose some tribunal ; and although the defendant be non-resident and an alien, he has adopted one in his own country, its laws giving that court jurisdiction over his opponent. This difference, however slight it may on analysis appear, has always been maintained ; and the consequence is that whereas the most common form of defence is absence of jurisdiction in the foreign court, yet the plaintiff may not raise this question of jurisdiction by way of reply, by reason of his so-called voluntary submission to the tribunal."²⁸ Voluntary appearance by the defendant also before a foreign court, as before a domestic court, is often said to confer jurisdiction on that court, which it does not possess otherwise, and such appearance will certainly estop him from pleading defect of personal jurisdiction, and in British India it will have that effect in spite of the last clause of Explanation VI of Sec. 13.

Thus if a party choose to appear and contest the merits, and thus submit to the jurisdiction of the court, waiving his personal immunity, the judgment will be as conclusive as though he were a resident or citizen of the state in which the judgment is obtained.²⁹ In *Kandoth Mammi v. Neelancherayil*,³⁰ the defendant had appeared in the court at Mahé and defended the suit without making any objection to the jurisdiction. Sir William Morgan, C. J., and Holloway, J., said that, "Justice requires us to hold that a man who has thus taken the chances of a judgment in his favor, which would, if obtained, have relieved him from all liability, is equitably estopped from afterwards setting up the objection." And that decision was approved of and followed in *Nallatambi Mudaliar v. Ponnusami*³¹ on the ground that "by appearing in the foreign court and taking no exception to its jurisdiction, the defendant for

²⁸ Pig. For. Jud. 40.

²⁹ *Horbin v. Chiles*, 20 Mo. 314.

Rogers v. Rogers, 15 B. Mon. 304.

³⁰ VIII M. H. C. R. 16.

³¹ I. L. R. II Mad. 400.

the time, puts himself under the jurisdiction of the court." Sir Charles Turner, C.J., and Muttusami Ayyar, J., observed in that case that "he has led the plaintiff to believe that the proceedings are allowed by him to be effectual, and encouraged the plaintiff to proceed in them instead of withdrawing from them and instituting proceedings elsewhere. It is, therefore, in our opinion, a legitimate application of the principles recognized in our courts to hold that a defendant who has, under the circumstances, submitted to the jurisdiction, cannot afterwards question it." The same has been recently held in *Fazal Shau v. Gafar Khan*,⁵² in which Sir Arthur Collins, C. J., and Shephard, J., observed that "the defendant did not protest that the court had no jurisdiction, but appeared by an agent and defended the suit. Having done so, and having taken the chance of a judgment in his favor, he cannot now, when an action is brought against him on the judgment, take exception to the jurisdiction."

The same view is taken by the English courts. Thus in *De Cosse Brissac v. Rathbone*,⁵³ it was contended that the defendants had appeared in the foreign court, merely for the protection of the property which they had in France and which would have been liable to seizure if they had not appeared and a judgment were passed against them for default, but the argument was overruled; and it was held that "where the defendant voluntarily appears and takes the chance of a judgment in his favor, he is bound." Lord Blackburn also expressed an opinion against similar contention in *Simpson v. Fogo*;⁵⁴ and in *Dufles v. Burlingham*.⁵⁵ The same was held in *Voinet v. Barrett*.⁵⁶ Mr. Pigot also observes that the distinction is not only unsubstantial but unsound.⁵⁷ Speaking of the practice of the American courts, Mr. Freeman says.⁵⁸ "If the defendant, though a non-resident, not subject to the jurisdiction of a foreign court, appears in the action, he cannot avoid the effect of the judgment entered therein against him by showing that he appeared merely to protect his property from seizure upon a judgment by default."⁵⁹

(g) The decision in *Appaxami Poulle v. Parry*⁶⁰ is not against this view, as though the defendants defended the suit and appealed against the decision in it, yet they first of all protested against the jurisdiction of the court, and the Madras High Court said: "It would have been idle to repeat an objection which they were aware the French courts would not entertain, but there is nothing to show that they abandoned their right to insist on it should the necessity for doing so arise elsewhere."

⁵² I. L. R. XV Mad. 82.

⁵³ 6 H. & N. 391.

⁵⁴ 12 L. J. Ch. 249.

⁵⁵ 34 L. T. 695.

⁵⁶ 55 L. J. Q. B. 39.

⁵⁷ 12 P. & F. 163.

⁵⁸ 10 P. & F. 1017.

⁵⁹ V. L. J. 191.

⁶⁰ 55 L. J. Q. B. 39.

219. Foreign judgments have, on the analogy of the practice of the English Courts, long received a recognition in the courts in British India, even as the basis of claims, and often been enforced by means of suits brought on them and decreed. Even prior to the enactment of the Civil Procedure Code of 1859, it was laid down in Macpherson's Civil Procedure Code, that, "Foreign judgments must, in order to be received, finally determine the points in dispute, and must be adjudications upon the actual merits; and they are open to be impeached upon the ground that the foreign court had no jurisdiction, whether over the cause, over the subject-matter or over the parties, or that the defendant never was summoned to answer, or had no opportunity of making his defence, or that the judgment was fraudulently obtained."^{39a} And this was quoted with approval by Bayley, J., in *Sreechuree Bukshee*,⁴⁰ in which a claim was brought on a judgment of a French Court. In *Boloram v. Kameenee Dossee*⁴¹ also, a suit was brought on a judgment of a French Court in the Civil Court of Hoogly, and on appeal, the Calcutta High Court said, "If that court finds that there is no reason to question the decision upon the ground of fraud or want of jurisdiction, or that it was unduly obtained, the court should accept the foreign judgment, as conclusive between the parties, and should not enquire into the merits of the case, or the propriety of the decision." Such suits have in fact been quite frequent in the courts since their first establishment. The law on the point was much discussed in *Bikrama Singh v. Bir Singh*⁴² in which Plowden, J., said: "It has long been established in England as well as America and other countries, that an action may be founded upon a foreign judgment; and suits of this nature have also been recognized in India. They were recognized some 60 years ago in the courts of the mofussil by the Sadar Diwani Adawlat of Bengal, which regarded suits upon decrees of the Supreme Court as suits upon foreign judgments."⁴³ In Morley's Digest, Volume I, page 504, are two instances of suits on judgments in the Supreme Court in 1776 and 1778, and the note indicates that such actions were not unfrequent in 1850.⁴⁴ The Sadar Diwani Adalat, Bengal, in Construction No. 1133, and in the

^{39a} P. 200 (Ed. 2nd).

⁴⁰ XV W. R. 500.

⁴¹ IV W. R. 109.

P. R. No. 191.

S. D. A. III Sel. Rep. 111.

S. D. A. VI Sel. Rep. 187.

S. D. A. VII Sel. Rep. 547, 570, 571.

⁴⁴ Title, Practice, No. 63.

case noted at page 389 of Morley's Digest, Volume I,⁴⁵ regarded foreign judgments as enforceable by action. The like view has been taken by the High Court of Calcutta. Suits brought upon judgments of the French Court at Chandernagore have been treated by the High Courts as maintainable,⁴⁶ and the English Law as to such suits applied. In XV W. R. 500, it appears not to have been doubted that if the Recorder had jurisdiction over the defendant, an action brought on a judgment of the Court of Queen's Bench would lie. An instance of such a suit in the mofussil of Bombay is to be found in I. L. R., III Bom., page 193.⁴⁷ The same doctrine is well established in Madras, the cases being collected in the judgment in *Sama Rayar v. Annamalai Chetti*.⁴⁸ It has also been recognized by this court in respect of a judgment of a court of the Faridkote State in case No. 4 of Punjab Record 1874. Lastly, the Limitation Act, 1877, in Article 117 of Schedule II, expressly contemplates suits upon foreign judgments."

In the Civil Procedure Code of 1877, the rule of *res judicata* was enacted, for the first time, so as to embrace the bar of a fresh trial by a foreign judgment. The language of the main rule was, no doubt, as regards the court of competent jurisdiction, co-extensive with that which was employed in the rule of *lis pendens* as enunciated in Sec. 12 of the Civil Procedure Code. But the express exclusion of foreign courts from that rule by a special Explanation attached to Sec. 12, and its non-exclusion from the rule of *res judicata* clearly showed the wider scope of the latter rule. All possible doubt in regard to the matter was removed by the addition to Sec. 13 of Explanation VI, which provides that "where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the court which made it had competent jurisdiction, unless the contrary appears on the record; but such presumption may be removed by proving the want of jurisdiction." Since then the recognition of a foreign judgment as *res judicata* has been a portion of the positive law of British India. In *Kandasami v. Moidin Saib*,⁴⁹ a suit was brought on a judgment of a foreign court, and the judgment was held con-

⁴⁵ No. 242, Title, Jurisdiction.

⁴⁶ *Bolovan v. Kannoos Dossoo*, IV W. R. C. R. 107.

Heera Monee v. Promothonath, VIII W. R. 32.
Sreenuree Bukshoe v. Gopal Chunder, XV W. R. 500.

⁴⁷ *Sakthiam v. Ganesh Satho*.

⁴⁸ I. L. R. VII Mad. 164.

Kan loth Maiman v. Noorchoyyl, VIII M. H. C. R. 14.

Kandasami Pillai v. Moidin Saib, I. L. R. II Mad. 337.

Nallathambi Marudai v. Ponnasami, I. L. R. II Mad. 400.

⁴⁹ I. L. R. II Mad. 337.

clusive against the defendant. In the Civil Procedure Code of 1882, the section was amended so as to render the competency of jurisdiction necessary in regard to the subsequent suit also. That did not affect, however, the effect of foreign judgments as *res judicata*.

220. In *Bhavanishankar v. Pursadri*,⁵⁰ the Bombay High Court made a distinction between the judgments of French Courts and those of the courts of the Protected Native States in India. Mr. Justice Melvill, in delivering the judgment of the court, said—"that the Civil Procedure Code contains no provision for making a foreign judgment an engine of attack, as well as a means of defence. . . . We cannot find in the Reports a single instance in which a suit founded upon the judgment of such a court has been entertained by a court in British India, and in the absence of precedent, we are not disposed to express an opinion favourable to the entertainment of such suits. . . . It may now be taken as established that a court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action, or the propriety of the decision. It can feel no confidence that it is doing justice between the parties, except in so far as such confidence is based upon its general belief that the tribunals of the Foreign State ordinarily conduct judicial enquiries with intelligence and integrity. . . . Some courts in Native States may be sufficiently well constituted, and their proceedings sufficiently well conducted, to entitle their judgments to respect; but this is notoriously not so in regard to other States, and, indeed, must be regarded as the exception rather than the rule. Our courts are not in a position to draw distinctions, which would necessarily be invidious, and not necessarily correct, between the courts of different Native States. . . . We think that it is safe and proper to hold that the legislature did not intend that the courts of British India should in any way enforce the decrees of any courts situate in Native States, except such courts as may have been notified by the Governor-General in Council under Sec. 434. It follows at once from this that a suit cannot lie in a British Court upon the judgment of any Native Court not so notified. . . . We think that it was clearly the intention of the legislature that the decrees of

Courts in Protected Native States are Foreign Courts for the purpose of the rule of *res judicata*.

the privileged Native courts should occupy the same position as the decrees of British Courts, and should not carry with them any greater advantages. . . . Except in this peculiar case (in which suits are permitted to be brought in the High Courts on judgments of Courts of Small Causes in order to obtain execution against immovable property) it must be taken to be settled that a suit will not lie in our courts upon the judgment of any court in British India; and it follows that a suit will not lie upon the judgment of any Native court, although such court may have been notified under Sec. 434." This decision was dissented from in *Sama Rayar v. Annamalai-chetti*,⁵¹ in which Hutchins, J., said that—"he should be inclined to draw exactly the opposite inference from the fact that the decrees of privileged Native courts may be executed as if they had been passed by British Courts. The reason why a suit will not lie on the judgment of one of our courts is that Sec. 244 of the Code provides that all questions relating to the enforcement of a judgment shall be determined by order of the court executing the decree and not by separate suit. It is a greater privilege to be able to execute a decree than to be able to enforce it by another suit; and Sec. 14 seems to show that there are many grounds upon which a foreign judgment may be impeached in a suit which could not be pleaded in execution proceedings. It would be surprising if the legislature had enabled the Governor-General in Council to give to the decrees of Native courts all the force possessed by British decrees before allowing them the moderate efficacy possessed by other foreign judgments." Kindersley, J., in his decision in that case, pointed out that *Mathappa v. Chellappa*⁵² was an appeal arising out of a suit which was brought upon a decree of the Civil Court of Puddukotta; "and the whole of the argument of Mr. Justice Holloway in that case would have been beside the question, if in no case would a suit lie upon a decree of a court of a Native State; that the term foreign court and foreign judgment are defined in the Civil Procedure Code so as to include the courts in the Native States and their judgments, and no distinction is made in any part of the Code, or in the Indian Limitation Act relating to suits on foreign judgments between the judgment of a French Court and that of a court in a Native State.

The Punjab Chief Court also has taken the same view in *Bikrama Singh v. Bir Singh*,⁵³ in which Plowden, J., said: "I

⁵¹ I. L. R. VII Mad 164.
⁵² I. L. R. I. Mad. 196.

| ⁵³ 1888 P. R., No. 101 P. 502.

take the judgment of the Commissioner in this case, and that of the Bombay High Court which he has followed, to amount in substance to this : that even if an action can be founded in our courts upon a foreign judgment, the judgments of the courts of Native States in India ought to form and do form an exception to the rule. Or, in other words, it ought to be and is a valid defence to an action founded on a foreign judgment that it is the judgment of such a court. This contention seems to be based upon three grounds :—(1) that actions on judgments appear not to be recognized and to be by implication prohibited by the Code of Civil Procedure, Sec. 11 and Sec. 434 ; (2) that the obligation to obey a judgment is not included in the Indian Contract Act among obligations resembling those created by contract ; and (3) that the rule of justice, equity and good conscience requires the judgments of courts of Native States to be made an exception to the general rule. As to the first ground, it is not within the scope of Sec. 11, and it may be doubted whether it is within the scope of the Civil Procedure Code to define causes of action. Any inference drawn from that section that the judgments of courts of Native States cannot form the basis of an action, may equally be drawn not only against suits upon any judgment, domestic or foreign, but also against suits on other obligations, however evidenced, or created, which are not expressly provided for by the Indian Legislature in the Code ; as, for instance, actions founded on torts. As to Sec. 434, in its terms it merely provides for the execution by the courts of British India of the decrees of such courts as the Governor-General in Council may notify under that section. The fact that in this section the legislature has made provision for the decrees of the courts of Native States being placed in an exceptional and favored position, equal to that of the decrees of domestic tribunals, is not logically sufficient ground for the conclusion, either that the judgments of all foreign courts (as defined in the Code) or of a particular class of such courts, *viz.*, courts of Native States not notified under Sec. 434, shall not be enforceable by suit in British India. It may perhaps be inferred that suits on the judgments of courts of States which have been notified under that section will not ordinarily lie, but even this rule might be open to exceptions. . . . On the other hand, in Sec. 2 of the Code defining a foreign judgment, no distinction is made between the judgments of courts of Native States and other foreign judgments, nor in

Sec. 13, where all foreign judgments are placed upon a footing of equality in bar of an action. As to the second ground, the argument from the Contract Act is of little force. The obligation which arises from the fact that the judgment of a court of competent jurisdiction whether domestic or foreign has adjudicated that a certain sum is due from one party to another is certainly not an obligation *ex contractu*. The obligation appears to arise from the duty of obeying the command of the Sovereign power issued by the court in exercise of the authority delegated to it by that power. Nor do I think that the relation existing between a judgment-creditor and a judgment-debtor can be said to be a relation resembling those created by contract, within the meaning of the Act. It is true that in the English courts until recently, though apparently not since the Judicature Act came into force, the form of action in suing upon a judgment adjudicating money to be due was an action in *assumpsit*, as for a debt. This was in truth a fiction of the English law. The same form applied to an action by an informer for a penalty under a Statute, and having regard to the source of the obligation in either case, there is a close analogy between the two actions, and they are in fact classed together by Blackstone.⁵⁴ As to the third ground, I am unable to agree with the Commissioner that the rule of justice, equity, and good conscience requires that if actions be held maintainable on foreign judgments, the judgments of courts of Native States should be treated as an exception; or, in other words, it should be a valid defence that the judgment was pronounced by the court of a Native State. To affirm this proposition would involve the affirmation that no judgment pronounced by a court of a Native State, although of competent jurisdiction, is worthy of recognition in our courts when set up by a plaintiff as the basis of an action. I cannot reconcile this with the enactment by the Legislature of Sec. 13 of the Code, which places all foreign judgments upon a footing of perfect equality when set up by a defendant in bar of an action. I apprehend that in every action upon a foreign judgment in this Province, every defence is admissible which justice, equity and good conscience require to be admitted. As a general guide to the rule required by justice, equity and good conscience, I have no hesitation in holding that the court is justified in resorting to the English law, as well as the law of other countries, for principles on which to frame its own rules

⁵⁴ Black. Comm. III. 160.

for particular predicaments. In so doing, this court has the example of the Indian Legislature in legislating, and of the High Courts of Calcutta and Madras in dealing with this very subject. This court must also, I think, be guided by the principles on which the Indian Legislature has acted in dealing with the cognate question of the exception admissible to the judgment of a foreign court of competent jurisdiction, when set up in our courts as a plea in bar. Thus, I think, it may be deduced from Sec. 14 of the Code, that any exception which may be set up under Sec. 14 to a foreign judgment when pleaded in bar may be set up as a defence to a suit on a judgment of a foreign court of competent jurisdiction. The defence admissible certainly cannot be held to be only co-extensive with the exceptions enumerated in Sec. 14. For other defences may be found which according to the broad rule of equity, justice and good conscience ought to be recognized as valid. At the same time the adoption of the rule in Sec. 14 of the Code as indicating defences which should be admitted almost necessarily involves this, that any matter which the express terms of these rules render by necessary implication inadmissible as a ground of exception, must also be regarded as inadmissible as a ground of defence. For instance, an exception based on the allegation that the judgment proceeded on a mistake of the foreign court as to its own law, (whether or not such mistake be apparent on the face of the proceedings) appears to be an exception excluded by the terms of clause (b) of Sec. 14, and inadmissible as an exception (unless it also falls under one of the other clauses), and, therefore, presumably inadmissible as a defence. It is further a material fact that in dealing with foreign judgments when set up by a defendant in bar to an action, the Legislature has put all foreign judgments on a footing of equality, avoiding any invidious distinction as to the judgments of courts of Native States. It is difficult as I have said to reconcile this enactment with the proposition under notice which involves the affirmation that no judgment of such a Court, even if it be of competent jurisdiction, is worthy of recognition when set up by a plaintiff as the basis of an action." The learned Judge added "that in no Court either of law or equity in England, as I understand, could a defendant succeed by a bare plea in an action upon a foreign judgment that it was the judgment of a Court of a barbarous or uncivilized State. He would have to advance some more specific and definite ground than this for avoiding

the judgment." In France the idea of making any general distinction between the recognition of the judgments of the civilized and the uncivilized nations has been condemned as impolitic. *Comment en effet classer les peuples en nations civilisées dont les jugements peuvent être acceptés, et nations non-civilisées dont les jugements doivent être repoussés? L'opération présenterait autant de difficultés que de danger et d'inconvenance.*⁵⁵

is a direct result of the manner in which the rule of *res judicata* in regard to foreign judgments has been enacted in this country, that such a judgment will not be *res judicata* here unless it would be such if it were passed in this country.

Foreign judgment cannot be *res judicata* unless it were so in the country in which it was passed.

Besides, a foreign judgment to receive effect in any country must have been final and conclusive in the country in which it was passed.⁵⁶ In *Frayes v. Worms*,⁵⁷ in which the defendant pleaded the judgment of a Court in California as *res judicata*, Erle, C.J., in the course of the argument referred to the circumstance that it did not "appear that by the law there administered the decision was final. If the Court passing a judgment or taking cognizance of it on appeal suspends its execution, an action on it in the English Courts will be stayed until the suspension is removed."⁵⁸ It has sometimes been held that the pendency of an appeal may afford ground for the equitable interposition of the Court to prevent the possible abuse of its process, and on proper terms to stay execution in the action, but it cannot be a bar to the action itself.⁵⁹ Mr. Westlake observes, however, that when a judgment is of no force in its own country pending the appeal, it would seem that it ought on principle to receive no force here;⁶⁰ and he cites *Patrick v. Shedden*⁶¹ in support of the view that no action would lie on a foreign judgment that "could be executed in its own country, pending the appeal, only subject to security being given for repayment in case of reversal."

This appears to have been considered as the established doctrine in the United States also in *Faber v. Hovey*,⁶² in which it was held by the Massachusetts Supreme Court that "if by the law of the State where judgment is obtained appeal

⁵⁵ Mor. Eff. Int. 257.

⁵⁶ *Nouvion v. Freeman*, 15 Ap. Ca. L.

Paul v. Roy, 21 L. J. Ch. 361.

⁵⁷ 10 C. B. N. S. 149.

⁵⁸ *Frith v. Wollaston*, 21 L. J. Ex. 108.

⁵⁹ *Munroe v. Pilkington*, 31 L. J. Q. B. 81.

Vanquelin v. Bouard, 33 L. J. C. P. N. S. 78.

⁶⁰ *Westlake*, 342.

⁶¹ 2 El. & Bl. 14.

⁶² 19 Am. Rep. 3

does not stay proceedings on judgment in that State, pendency of such appeal is no bar to action on judgment." Similarly, Mr. Wells says: "It is a settled principle that the judgment of a Court cannot have elsewhere any other or greater force or effect than it has in the State wherein rendered, so that where a Statute provides that all contracts which are joint only by the Common law shall be considered as joint and several, and there under a judgment is recovered against one of several joint obligors, that judgment does not discharge the original obligation as to the co-debtors not sued, and therefore they cannot avail themselves of it when afterwards sued on it in another State."⁶³ ⁶⁴

This principle is of quite a general application and recognised in almost every country in Europe. Speaking of the French Law, M. Moreau says: "*Qu'on ne peut déclarer exécutoire un jugement contre lequel un recours suspensif d'exécution peut encore être formé, à moins cependant que la législation du pays où a été rendu le jugement ne donne effet aux jugements même non définitifs. Mais en ce cas l'exequatur ne doit être donné qu'avec réserve des droits qui peuvent encore être exercés devant les tribunaux étrangers par le défendeur condamné.*"⁶⁵ Similarly, M. Constant says: "*Un tribunal ne peut donc accorder l'exequatur à un jugement étranger que si la décision étrangère est elle-même exécutoire dans le pays dont elle émane, au moment où l'on en réclame l'exécution dans un autre pays.*"⁶⁶ In Germany also it is necessary "*que cette décision est passée en force de chose jugée dans le pays où elle a été rendue, c'est-à-dire qu'elle ne peut plus être attaquée, dans une instance régulière, au moyen d'un recours quelconque.*"⁶⁷ In Belgium that rule has been expressly enacted in the Civil Procedure Code.⁶⁸

222. The Indian Legislature in recognising foreign judgments as *res judicata* did not adopt the view of the English Courts as to their absolute conclusiveness, and qualified the general rule enacted in Sec. 13 by a number of limitations embodied in the next Section.⁶⁹ There being no express provision as to when a suit may be brought on a foreign judgment, there is no enactment also as to the circumstances in which such a judgment may or may not be

Suydam v. Barber, 75 Am. Dec. 274.
Woll. Res. Jud. 474.
Mor. Ed. Int. Jug. 56.
Con. Exe. Jug. Etr. 7.

⁶³ Con. Exe. Jug. Etr.
⁶⁴ Vol. B. 10.
⁶⁵ Vol. Supra S. 14.

considered conclusive, when it forms the ground of a suit. It has been held, however, that “whatever objections are declared by the Legislature to be admissible against a foreign judgment produced by a defendant in bar to an action, are equally admissible against a foreign judgment produced by a plaintiff either to found or to support an action.” “When the Legislature has solemnly declared,” said Plowden, J., in *Bikrama Singh v. Bir Singh*,⁷⁰ “that as between plaintiff and defendant a foreign judgment relied upon by the defendant shall be deprived of its efficacy as an adjudication, if it has certain specified defects, I think the Indian Courts are bound to follow this example and hold that the same defects shall deprive a foreign judgment of efficacy when relied upon by the plaintiff, with the consequence that no defect can be held to vitiate a foreign judgment, when relied upon by the plaintiff, which, according to the same Legislative enactment, could not vitiate such a judgment when relied upon by the defendant. Upon this view it is not competent to our Courts to examine any foreign judgment, whether of the Court of a Native State or any other State, in order to determine whether the judgment is erroneous upon the merits, unless it appear on the face of the proceedings to be founded upon an incorrect view of International Law, or some law in force in British India. But our Courts may determine whether a judgment relied on by a plaintiff and pronounced upon the merits was pronounced by a Court of competent jurisdiction, whether it is, in their opinion, contrary to natural justice, and whether it was obtained by fraud.” The exact character of these limitations, subject to which foreign judgments are to receive effect here, has not often come for decision before the Courts in British India, but valuable help may be had in the determination thereof from the earlier cases in England in which similar limitations were recognized in giving effect to foreign judgments as grounds of action.

223. In 1888 the Indian Legislature, in all probability with reference to the arguments urged by the Bombay High Court for distinguishing the judgments of the Courts of Native States from those of other Foreign Courts, enacted,⁷¹ that “where a suit is instituted in British India on the judgment of any Foreign Court in Asia or Africa except a Court of Record established by

Provision for enquiry into the merits of judgments of foreign Courts in Asia and Africa.

Letters Patent of Her Majesty or any predecessor of Her Majesty, or a Supreme Consular Court established by an order of Her Majesty in Council, the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed." The effect of this amendment is to allow "the merits of a case to be enquired into our Courts, even when they have been fully enquired into by the Foreign Court."⁷² Apparently this is virtually destroying the effect of a foreign judgment not only as a ground of action but also as a *res judicata*; and a refusal to give recognition to the judgments not only of the Courts of Native States but also of those in the French and Portuguese territories in India, and even of the English Lower courts in the Colonies and Dependencies of the British Empire in Asia and Africa. Mr. Justice Story observed⁷³ that "the rule that the judgment is to be *prima facie* evidence for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances, it would be equivalent to granting a new trial." This observation has been adopted by Mr. Herman,⁷⁴ and other writers. The Madras High Court took, however, an opposite view of the effect of the amendment in *Fazal Shau Khan v. Gafar Khan*; ⁷⁵ in which Sir Arthur Collins, C.J., and Shephard, J., said: "We are clearly of opinion that it was not intended by the Legislature when amending Section 14 of the Code that parties to an action on a foreign judgment should have the right to have the case re-heard. All that the section says is that the Judge is not to be precluded from inquiry into the merits. In the present case he has so inquired having had before him ample materials in the judgment of the Bastar Court and the evidence then taken, and he then found that the judgment was well founded."

224. Considering the limited extent to which the force of *res judicata* has now been left in this country to foreign judgments, a close examination of the limitations prescribed by Sec. 14 is not necessary, and only a few general observations will be made in regard to them. The first limitation provided for is that a foreign judgment to operate as a *res judicata* should be on the merits. A judgment of dismissal of a suit on account of bar by law of limitation not be on the merits, and therefore not binding in any

Jones v. Zahru Mal. 18-0. P. R. No. 66.
Story Conf. Law S 607.

⁷² Herm. Comm. 651.

⁷³ I. L. R. XV Mad. 82

country other than that in which it was pronounced, though it might be considered to be on the merits if it proceeded on a statute of prescription or on a statute which not only barred the remedy but extinguished the right itself.⁷⁷ In fact, if the law of the foreign country only barred the remedy, the only issue decided in that country in such a case would be as to whether the suit was barred there, and a judgment on that point could have no bearing in determining even whether a suit on the same cause of action would not be barred in any other country, whether the rules of limitation applicable to that class of suits might be different.

In *The Delta*,⁷⁸ Sir Robert Phillimore appears to have held that a judgment by default is on a matter of form and not on the merits; and therefore not entitled to recognition. It appears that in that case there had been an enquiry into the merits. Mr. Pigott says: "This principle is also to be found in many foreign decisions," but that it "should certainly be strictly limited to judgments coming from countries in which a judgment by default is a matter of form only, the law there not requiring an examination into the merits."⁷⁹ In British India an *ex parte* judgment is preceded by an enquiry into the merits and therefore can never be a matter of form only. In *Bikrama Singh v. Bir Singh*⁸⁰ the judgment sued upon had been passed on an *ex parte* enquiry, and the Punjab Chief Court held that it could not be examined to determine whether it was erroneous on the merits. The decision of the Chief Court in *Jones v. Zahru Mal*⁸¹ is not against that view, as it proceeded on the ground that the *ex parte* judgment discussed "none of the merits of the case as regards defendants 1 and 2, and more inquiry should have been made, notwithstanding the non-appearance of defendants 1 and 2." Mr. Frizelle, in delivering the judgment of the Court, said: "Had defendants appeared and pleaded in the Nahan Court, plaintiff no doubt would have been prepared with further evidence, but their not having done so, does not make the judgment one on the merits, and the only remedy I can see is that plaintiff should now be allowed to prove his case on the merits, and that there should be a full inquiry and a decision on the merits as if the suit had been originally brought in the Umballa Courts." The learned Judge expressly

⁷⁷ *Harris v. Quino*, 4 Q. B. 653.

⁷⁸ L. R. 1, P. D. 303.

⁷⁹ *Pig. For. Jud.* 208.

⁸⁰ 1858 P. R. No. 101.

⁸¹ 1860 P. R. No. 66.

admitted, however, that to bar an enquiry into the merits, "the judgment should be one on the full merits, and in an *ex parte* case as far as they can be ascertained *ex parte*."

225. As to the appearance on the face of the proceedings of a mistake of International Law or of the law of British India, an apparent error, as distinct from a provable error, in a foreign judgment has often been held to avoid it in the courts of a foreign country.

Foreign judgment to be a bar in British India must not disclose on its face a mistake of International or Indian Law.

In *Reimers v. Druce*,⁸² Lord Romilly, M. R., expressly said that "a foreign judgment sought to be enforced in England was impeachable for error apparent on the face of it, and explained that, by apparent error, he meant such error as shows upon the face of the judgment itself, as without any extrinsic evidence, shows that the Judge had come to an erroneous conclusion, either of law or of fact." Sir Robert Phillimore in delivering the judgment of the Privy Council in *Messina v. Petrocchino*,⁸³ incidentally observed that "a foreign judgment of a competent court may indeed be impeached, if it carries on the face of it a manifest error." In *Simpson v. Foggo*,⁸⁴ Wood, V. C., expressed a similar opinion. Blackburn, J., however in *Godard v. Gray*,⁸⁵ condemned the distinction, observing that "in no case that we know of, is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English Law not apparent on the proceedings, but which the defendant avers he can show did exist." The distinction has, however, been retained in India. Sec. 14 recognizes an apparent error as a sufficient plea against a foreign judgment, but only if the mistake is as to International law or the law of British India. Thus even an apparent mistake in regard to facts or as to the law of the country in which the judgment may have been pronounced, or of any other country will not be a good plea against a foreign judgment.

In regard to mistakes of facts or of the law of any country other than that of England, the view of the English Courts appears to be the same. Thus in *Bank of Australasia v. Nias*,⁸⁶ the defendant in a suit brought to enforce a

145. | ⁸² L. R. 4 P. C. 157. | ⁸³ 20 L. J. Ch. 657. | ⁸⁴ 6 Q. B. 152. | ⁸⁵ 16 Ad. & El. 717.

Colonial judgment advanced certain pleas denying the promises upon which the original action was brought, and alleging that they were obtained by plaintiff's fraud. Lord Campbell, C. J., said: "The pleas demurred to must now be taken to have been in due manner decided against the defendant. . . . It seems contrary to principle and expediency for the same questions to be again submitted to a jury in this country." And since that decision, Cockburn, C. J., in *Munroe v. Pilkington*,⁸⁷ said: "we are bound to hold that a judgment of a foreign court having jurisdiction over the subject-matter cannot be questioned on the ground that the foreign court had come on the evidence to an erroneous conclusion as to the facts." So also in the United States, in *Harrison v. Lowrie*,⁸⁸ a suit was brought on a judgment recovered in the English Court of Queen's Bench; and the New York Superior Court said—"The court in which the trial was had and judgment entered having acquired jurisdiction of the person of the defendant, its adjudication upon the issues formed by the pleadings is conclusive in an action upon the judgment in the courts of this country, and the defendant is precluded from inquiring into, questioning, or defending upon the merits." And in *Konitzky v. Meyer*,⁸⁹ it was held that "an indemnitor is bound by the judgment in a suit against the person to whom he is liable, in respect to the subject-matter of the guaranty, if he had notice of the action, and that a judgment rendered in Germany has the same effect in this respect as one pronounced by our own courts."

As to a mistake of the courts of the *lex fori* there is a general presumption in favor of their correctness as to that law. Parke, B., in *Alivon v. Furnival*,⁹⁰ said that "the foreign judgment is *prima facie* evidence of the law therein laid down." Hayes, J., in *Dent v. Smith*⁹¹ observed that "the decision is about the best evidence you can have of the law of the country." In *Messina v. Petrocchino*,⁹² Sir R. Phillimore in delivering the judgment of the Privy Council, said: "It must be presumed that the Greek Court rightly interpreted and applied the Greek law." It is generally considered that "a foreign judgment, when it is brought into the English Courts to be enforced or recognized, is not examinable on the ground of a mistake in the interpretation and application of its own

2 B. & S. 11.
49 How. Pr. 124.
49 N. Y. 571.

87 1 G. M. & R. 277.
88 L. R. 4 Q. B. 454.
89 L. R. 4 P. C. 150.

law.⁹³ This presumption in favor of correctness in regard to the law of the country in which the judgment is rendered has sometimes been held to be capable of rebuttal. Thus in *Becquet v. MacCarthy*,⁹⁴ Lord Tenterden said—"We ought to see very plainly that that (French) Court has decided against the French Law, before we say that their judgment is erroneous upon such ground," implying that if it clearly appeared, the Court would not give effect to the judgment. In *Castrique v. Imrie*,⁹⁵ Blackburn, J., in delivering the opinion of the majority of the Judges, said that "we must (at least till the contrary is clearly proved), give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law." In *Meyer v. Ralli*,⁹⁶ a judgment of a French Court was allowed to be impeached in England as both the parties admitted that the Foreign Court had wrongly construed its own law, Archibald, J., having, in delivering the judgment of the court, said "the (French) Court expressly professes to proceed on the ground of French Law; and, although the presumption would be that the Court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the court has rightly declared it. The contrary, to use the words of Blackburn, J., clearly appears, and either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong." It does not profess to declare what is the law of Austria. If it had, though equally wrong, we might have been bound by *Castrique v. Imrie* to have given effect to it." Mr. Pigott says: "The defence that the foreign Court has made a mistake as to the law of some third country incidentally involved cannot be raised, the same principles applying to this as to the preceding cases."⁹⁷

226. In fact, in England even the plea recognized by the Indian Legislature as to apparent errors in regard to International law or English law is not allowed at present. In England the present law on the entire question was laid down in *Godard v. Gray*,⁹⁹ by Blackburn, J., who said

Even apparent mistakes of International or English law do not affect the binding force of foreign judgments in England.

⁹³ *Bank of Australasia v. Nias*, 16 Ad. & El. 717. Followed by Cockburn C. J., in *Munroe v. Pilkington*, 2 B. & S. 11. By Martin, B., in *De Cosse Brissac v. Rathbone*, 6 H. & N. 301. By Romilly, M. R. in *Reimers, v. Druce*, 23 Leav.

By Lord Colonsay, in *Castrique v. Imrie*, L. R. 4 H. L. 414. 2 B. & Ad. 957. L. R. 4 H. L. 430. 1 C. P. D.

⁹⁷ *Pig. For. Law*, 136. ⁹⁹ 6 Q. B., 150.

that the decisions “seem to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook the facts or the law.” Thus Mr. Foote in his work on Private International Law, says: “It has been stated that a foreign judgment will be reviewed here, if based upon an erroneous interpretation either of Private International Law or of English Law, but the later decisions clearly show that this is a misapprehension. There can be no difference, in the words of Blackburn, J., between a mistake made by a foreign court as to English law, and any other mistake, unless it is to be said that a defence which is easily proved is to be admitted, but that one which would give the court much trouble to investigate is to be rejected; and accordingly no foreign judgment can be impeached by showing that it was wrongly arrived at.¹ It may be assumed, from the enunciation of law by Blackburn, J., that the judgment of a court, if final, is examinable for no error or mistake, except a mistake by which it gave itself jurisdiction, although by the principles of Private International Law, it would have had none. The earlier *dicta* to the effect that a foreign judgment will be reviewed for any error in Private International Law, or for any violation of natural justice, would seem, upon examination of the authorities, strictly applicable only to this point.”

227. The term natural justice has been sometimes used and understood in a very comprehensive and vague sense. It has been put forward even as a reason for the validity of any defence; Sir G. Mellish, L. J., having, for instance, observed in *Ochsenbein v. Papelier*,² that “It was held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or of want of jurisdiction, or that the judgment was fraudulently obtained.” It might seem even to allow of an investigation into the moral rightness of the decree. That the judgment or the proceedings of the Foreign Court “were contrary to the principles of natural justice is a

¹ P. 51

sweeping accusation which was formerly much resorted to as a defence, and is even now to be met with sometimes. Lord Ellenborough said there might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous that it could not raise an *assumpsit*, and if submitted to the courts of this country could not be enforced." These remarks were quoted with approval by Plowden, J., in *Bikrama Singh v. Bir Singh*. In *Sheehy v. The Prof. Life Assurance Co.*,⁴ Baron Watson said: "We cannot enquire into the proceedings of another court, except so far as we can see that they are contrary to natural justice. No doubt there is a presumption against a judgment being contrary to natural justice. A plea of contrariety to natural justice must allege specifically the facts showing the contrariety." In *Henderson v. Henderson*,⁵ Lord Denman, C. J., said, that injustice has been done "is never to be presumed; but the contrary principle holds, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice." But in certain circumstances, the inference in regard to a judgment being against natural justice is unavoidable. There is a reluctance sometimes expressed to give effect to a foreign judgment pronounced on summary procedure, without the enquiry directed by ordinary law. Thus in *Anderson v. Haddon*,⁶ the suit was brought by the liquidators of a Scotch Bank to recover the amount of a call upon its shares of stock, imposed by a decree of the Court of Session of Scotland, which was authorized to pass such a decree on production by the liquidators of such a company of a list, certified by them, of the names of the contributories liable." The Supreme Court held the suit untenable, observing that "inasmuch as the mode provided by the Act of Great Britain of ascertaining the liability of the defendant is summary, in derogation of the Common law, and in the nature of bankruptcy proceedings, it has no extra-territorial force, either by virtue of its own inherent elements or any provision contained in the Act itself creating a personal responsibility which could be enforced in the manner adopted in this action." On principle, however, a foreign judgment can be refused effect only, when the procedure, as in that case, is so summary, as to render the judgment obtained thereon repugnant to natural justice.

Similarly, a foreign judgment has been often held to be contrary to natural justice when it was pronounced by a court composed of persons having interest in the judgment and its results.⁷ Thus in *Price v. Dewhurst*,⁸ Shadwell, V.C., said, "wherever it is manifest that justice has been disregarded, and that the parties are merely making use of legal proceedings as a matter of form, for the purpose of doing that which is contrary to all notions of justice, viz., of deciding for themselves, and in their own favor, the court is bound to treat their decisions as a matter of no value and no substance."

As another illustration of a judgment being contrary to natural justice, reference may be made to the case of *Simpson v. Fogo*,⁹ in which Wood, V.C., treated as void a decision of the court at New Orleans, which refused to recognize the plaintiff's right in a ship which he had validly acquired, and which would have been admitted in any other country; it being a general principle that the transfer of personal property must be regulated by the law of the owner's domicile, and if valid by that law ought to be so regarded by the courts of every other country where it is brought into question. The law of Louisiana, however, as to the necessity of delivery to complete the sale of goods involves no such inherent injustice as absolutely to disentitle it to regard when brought into question in other countries. In *Liverpool Marine Credit Co. v. Hunter*,¹⁰ it was contended that the law of Louisiana, which refused to recognize transfers of property in chattels without delivery of possession, was so contrary to natural justice, that it was entitled to no respect in the English courts, but the contention was overruled, and with reference to the decision in *Simpson v. Fogo*, Lord Chelmsford said, "It is the application of the law to foreigners, and the refusal to recognize their title to chattels—a title which is valid and complete in their own country—unless the property is accompanied with possession, which renders, not the law itself, but the decision of the courts of Louisiana upon it open to the reproach of injustice."

228. The scope of the term natural justice has practically been restricted to much narrower limits. Thus Mr. Foote, after observing "that error in law, whether domestic, foreign or international, is not in itself a ground on which a judgment can be reviewed in a foreign court, unless such error involve an assumption of jurisdiction in violation of

⁷ 1838 P. R. No. 191.

⁸ *Jones v. Zahra Mal*, 1880, P. R. No. 66.

⁹ 8 Sim. 270.

¹⁰ 1 H. & M. 195.

¹¹ L. R. 3 Ch. Ap. 470.

ordinary international principles, or the court pronouncing the judgment, has proceeded without due notice against a party who is neither bound nor has consented to accept any substitute for notice in fact which the court may have deemed sufficient," says "so far as these requirements are based upon natural justice, the *dicta* that a foreign judgment contrary to natural justice cannot be recognized may be supported, but there seems no ground for extending them further."¹¹ In *Cowan v. Braidwood*,¹² the defendant being sued on a judgment of a court in Scotland in his plea as to the judgment being contrary to natural justice, only alleged that the proceedings in which that judgment was passed had not been notified to him "according to the course and practice of the court" and that he did not know of them so that he might "by himself, his proctor, attorney, or other agent by him appointed and instructed in that behalf, appear or plead, or in any way defend himself in the said action." The plea was rejected, however, as not disclosing a sufficient defence; as it might mean that he had no such notice, as he ought in strictness to have had, and was very far from alleging that he had not notice of the proceedings, and left it open that he might have had notice, so as to enable him to apply to the court. Bosanquet, J., said—"The plea does not allege that the defendant was not born or domiciled in *Scotland*, or that he had not property there; nor does it negative any of those circumstances which were adverted to in *Douglas v. Forrest*, as being necessary to give validity to the decree. Neither does it state that he had no notice of the proceedings. The words used seem rather to lead to the inference, that he had notice, but not in the regular way. The plea goes on to allege, that he did not know of the proceedings, so that he might appear and defend himself in person, or by attorney or agent. But this is a very qualified allegation. If the defendant meant to deny that he knew of the proceedings, he should have averred that fact in a different manner. It therefore seems to me, that the plea is deficient, and that the defendant is not warranted in the conclusion which he draws, that the decree is contrary to natural justice." And Maule, J., said—"The courts at Westminster, in sustaining decrees of foreign courts against absent persons, have decided, that, in their judgment, a decree may not be contrary to natural justice, although made against a party who is absent, for absence alone is not sufficient

¹¹ Foot Priv. Int. Law, 564.¹² 1 Man. & G. 882.

to invalidate the proceedings." In *Crawley v. Isaacs*¹⁵ Baron Bramwell said: "It is clearly contrary to natural justice in one sense, that a judgment should be enforceable when there was no cause of action, and yet it is clear that that is no defence to an action on the judgment. Does not that show that the term is used with respect to a foreign judgment in reference to the conduct or mode of procedure of the foreign court, rather than the merits of the particular case. . . . If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them, but, on the other hand, if the procedure be in accordance with the natural justice the foreign court itself will interfere to prevent the plaintiff taking advantage of the judgment improperly obtained." The plea of contrariety to natural justice is thus, "really narrowed to the question of assumption of jurisdiction over absent defendants, and its consequence 'service out of the jurisdiction.'"¹⁶

Even in regard to these matters, the laws of different States are not the same. "And although the method of conducting the trial, the rules of evidence applied, or other details of practice, may differ from those to which we have been accustomed in our own courts, we must not be too hasty in assuming that therefore the result is contrary to natural justice."¹⁵ "The methods of investigation in different countries," it was said in *Hilton v. Guyott*,¹⁶ "are adjusted to the conceptions of expediency and propriety that prevail in each, and it would be mere bigotry to assert that, upon the whole, the truth of disputed facts is not as well ascertained in France or Holland or Germany as it is in England or the United States. Our law of evidence is largely a series of negations, sedulously framed, to exclude from consideration all *indicia* of the truth which do not fall within the class of those it regards as competent and safe, while in continental countries a larger latitude of investigation is indulged. In matters of evidence and procedure, to say nothing about the weightier matters of law, the wisdom of yesterday is the folly of to-day; and it is doubtful whether our present methods do not differ as greatly from those of the recent period, when parties were not permitted to testify, as they do from the methods of continental countries. Who can say with reason that our system of investigation is more infallible than that

¹⁵ 16 L. T. 520.¹⁶ Pig. For. Jud. 171.¹⁵ Bl. Jud. 1007.¹⁶ 42 Fed. Rep. 253.

of France, or that a French citizen, sued here, could not as justly complain of our rules of evidence, or of a bill of discovery which compels him to exhibit his case in advance to his adversary, as one of our citizens sued in a French court could of the methods of procedure there." However as Wood, V.C., in *Simpson v. Fogo*¹⁷ said: "If you find a course of procedure there which is not recognized by any other country in the civilized world, our own citizens must be protected from the loss of their property which would be inflicted by decisions so arrived at." In *Fletcher v. Rogers*¹⁸ an assumption of jurisdiction over persons by seizure of their property within the country, even though at variance with the laws of most of the States, was held to be not contrary to natural justice.

229. Mr. Freeman says, "It would probably be impossible to formulate a definition of natural justice which all courts would accept as correct. All the courts in this country would, however, doubtless agree that it is contrary to natural justice to condemn a party, or to decide any issue in which he is interested, without giving him some notice of the proceeding against him and some opportunity of presenting his cause of action or defence to the consideration of the court, or even after notice, to require him to appear before the courts of a foreign nation to which he owes no allegiance and of which he is not a resident, either temporary or permanent, unless for the purpose of asserting his claim to property situate within the territorial limits of such nation."¹⁹

This is a requirement for the enforcing of a foreign judgment of a very general character. The French Jurists lay down expressly that the court asked to grant an *exequatur* for the execution of a foreign judgment ought to see *si les droits de la défense ont été respectés, c'est-à-dire si le défendeur a été régulièrement assigné ou mis en demeure de faire valoir ses moyens et exceptions*.²⁰ The Belgic Civil Procedure Code provides that the court asked for an *exequatur* shall before its grant examine, *si les droits de la défense ont été respectés*.²¹ The Italian Civil Procedure Code similarly pro-

¹⁷ H. & M. 195.
¹⁸ Eng. W. R. 97.
 Fr. Jud.

²⁰ Cons. Exe. Jud. Etr. 8.
²¹ *Ibid* 8, 10.

vides that the court shall see "*se citate regolarmente le parti*," and "*se la parti siano state legalmente rappresentate o legalmente contumaci*."²² Personal service, however, is not necessary. In *Becquet v. MacCarthy*,²³ a summons for the defendant had in his absence been served on the procurator-general in accordance with the law of the country in which the foreign judgment pleaded had been rendered. It was contended that the law did not provide any means whereby the procurator-general might hold communication or receive directions from an absent person, but Lord Tenterden, C. J., in delivering the judgment of the Court said: "We cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served."

And actual notice to a defendant, even if irregular, and therefore not sufficient to confer jurisdiction, is sufficient, if given in time, to avoid the objection of contrariety to natural justice.²⁴ In the case last cited, effect of a service of notice in an illegal manner was discussed at length, and Plowden, J., said: "A judgment pronounced without any notice of the proceedings to the defendant may undoubtedly be regarded as obtained by procedure opposed to natural justice, and therefore as a judgment contrary to natural justice. The defendant having had actual notice of the suit in the foreign court, and being, as I find, subject to the jurisdiction of the court, it is not open to him to object to the proceedings on the ground that the notice was not a legal notice. The contention for the defendant on this plea is that though the defendant had notice of the institution of the suit previous to its decision, the notice was not duly served according to the law of procedure which governed the court, and was not served in sufficient time to enable him to defend the suit. There is no allegation that the defendant was willing to defend the suit, and there is reason to infer that he had no such intention. The question of the regularity of the procedure in serving the process is a point which I apprehend the defendant is not entitled to open in this court. In *Castrique v. Imrie*, Lord Colonsay said:²⁵ 'It appears to me that we cannot enter into an inquiry as to whether the French court proceeded correctly either as to their own course of procedure or their own law.' The case of *Cowan versus Braid-*

Vide S. 941.
2 B. & Ad. 951.

²⁴ *Bikrama Singh v. Bir Singh*, 1885 P. R. No. 191.

²⁵ 4 H. L. 441.

*wood*²⁶ seems to be directly in point, where the absence of a defendant is technically correct, but is intentional. The principle as to defences on the ground of want of notice appears to be this: that the general jurisdiction is held not to attach in the particular case unless the defendant has had an opportunity of defending the case. This involves notice of the institution of the suit, and, probably, notice of a reasonable time before judgment. . . . At any rate when the defendant though non-resident is subject to the jurisdiction, and has actual notice from the court of the suit, so as to have an opportunity of defending it, it is no defence that the notice was not served in strict accordance with the rules of the foreign Court in that behalf. It may be a defence that, notwithstanding that the notice was formally served according to such law, the notice was illusory as affording no real opportunity of defending the action,²⁷ and *a fortiori* if the notice was informally served, the same defence would be valid . . . Defendant relies upon the case at Indian Law Reports, V Bombay 223. In that case it was found that 'there was not *de facto* notice or what could be deemed equivalent to it,' and the defendant was therefore not bound by an order of the court of Chancery in England made in his absence, and sought to be enforced against him in India. This does not conflict with the view that a person who has actual notice of a suit, sufficient to give him an opportunity of defending it, may be bound by it, or support the contention that he is not bound by the judgment unless the notice is regularly served."²⁸ So also in *Jones v. Zahru Mal*,²⁹ Frizelle, J., said: "It is not stated for them (the defendants) in appeal to this court that they did not receive notice, but if it happened to turn out to be a fact that they received no notice and merely did not put in this plea, because they disputed the jurisdiction of the Nahan court *ab initio*, this would necessitate the dismissal of the suit, not only as affecting the jurisdiction of the Nahan court — for no court has jurisdiction to decide a case against a person without allowing him the opportunity of a hearing — but also on the ground that to pronounce such a judgment would be contrary to the principles of natural justice." In *Bardwell v. Collins*,³⁰ the Minnesota Supreme Court said; "In proceedings *in rem*, as in admiralty, and the like, where the process of the court goes against the thing, which is in the

1 M. & G. 882.
Don. v. Lipmann, 5 Cl. & F. 1.
P. 512.

29 1889 P. R. No. 61.
30 20 Am. St. Rep. 547.

custody of the court, and is technically the defendant, and persons are not made parties to the suits, but come in rather as interveners, it is not essential to the jurisdiction that the persons having an interest in the thing to be affected by the judgment should have personal notice of the proceeding, or in fact any other notice than such as is implied in the seizure of the thing itself. There are other proceedings in the nature of proceedings *in rem*, many of them not strictly judicial, and none of them proceedings according to the course of Common law,—such as the probate of wills, administration on the estates of deceased persons, the exercise of the right of eminent domain, the exercise of the power of taxation,—which affect property rights, but in which personal notice to persons interested in the subject or object of the proceedings has never been deemed necessary. Some form of substituted service of notice, as by publication, has always, from considerations of public policy or necessity, been deemed appropriate to such proceedings, and hence, as to them, ‘due process of law.’ But we think that, from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States derived from that of England, it has always been considered a cardinal and fundamental principle that, in actions *in personam* proceeding according to the course of Common law, personal service (or its equivalent, as by leaving a copy at his usual place of abode) of the writ, process, or summons must be made on all defendants resident and to be found within the jurisdiction of the court. We do not mean that the term ‘proceeding according to the course of the common law,’ as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process; for although service by publication is of modern origin, there has always been some mode by which jurisdiction has been obtained at common law by something amounting to or equivalent to constructive service, where the defendant could not be found and served personally. But what we do mean to assert is, that the right to resort to such constructive or substituted service, in personal actions proceeding according to the course of the Common law, rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a non-resident, or had absconded, or had concealed himself for the purpose of avoiding service. As showing what means were resorted to as amounting or equivalent to

constructive service, and how strictly it was limited to cases of necessity by both courts of Common law and Courts of Chancery, reference need only be had to 3 Blackstone's Commentaries, 283, 444. As a substitute for the means formerly resorted to in England in such cases, most of the American States have adopted service of the process or summons by publication. But we have found no statute, except the one now under consideration, which has assumed to authorize such a mode of service, and have found no case where its validity has been sustained by the courts, except as to defendants who could not be found within the jurisdiction, either because of non-residence, or because they had absconded, or concealed themselves to avoid the service of process. We think this will be found true in every instance, from the earliest decisions on the subject down to the latest utterance of the Supreme Court of the United States in *Arndt v. Griggs*,³¹ in which that court took occasion to set at rest some misapprehensions as to the scope of their previous decision in *Hart v. Sunsom*.³²

230. In every attempt that has been made at a classification of defences against the recognition of foreign judgments, the fraud of the opposite party has always been put forward prominently as a sufficient excuse for refusing this recognition. This has, in most cases,³³ been taken as a truth, which it does not require any argument to support. So strict is the rule as to fraud, that it is allowed effect even as against the judgment of a court in a sister State in the United States. It has thus been held in a number of cases there, that the defence of fraud in obtaining a judgment may be made by plea in a court of law, to an action upon such judgment from another State,³⁴ though the question as to how far those cases were correctly decided does not require to be discussed in this Work. And the principle underlying the rule was well explained in *Murray v. Murray*,³⁵ in which the Oregon Supreme Court held that, "a judgment of a sister State could be attacked collaterally for fraud by a party when offered in evidence in the courts of this State, for the reason that the party sought to be affected thereby has no opportunity

³¹ 134 U. S. 316.

³² 110 U. S. 151.

³³ *Reimers v. Druce*, 23 Beav. 145.

Bank of Australasia v. Nias, 16 Ad. & El. 717.

Messina v. Petrocochino, L. R. 4 P. C. 144.

Ochsenbein v. Papelier, L. R. 8 Ch.

Rowles v. Orr, 1 Y. & Coll. 400.

³⁴ *Rooper v. Givin*, 21 Iowa, 59.

Stuart v. Stuart, 3 McArthur, 415.

Coffee v. Neely, 2 Heisk. 304.

³⁵ 6 Or. 17.

to attack it in our own courts by a direct proceeding, and should not be required to go into a foreign State to do so."

And the fraud in order to have this effect is made up of the same constituents as in an action of deceit, it being necessary, however, that there must be fraudulent allegations and representations designed and intended to mislead, with knowledge of their falsity, and resulting in damaging deception. In *Castrique v. Behrens*³⁶ it was held that a mere concealment of facts would not afford sufficient ground to avoid a foreign judgment, and also that the fraud to be a good plea must not be anything that was before the foreign court and virtually decided by it. In *Cammell v. Sewell*,³⁷ Martin, B., in delivering the judgment of the Exchequer Court, said that the fraud must be that in procuring the judgment, such as collusion or the like, or fraud in the court itself, and that it could not be set up against a foreign judgment that the defence to the suit in which it was rendered, was fraudulent. The decision on appeal by the Exchequer Chamber was based on other grounds. In *Crawley v. Isaacs*,³⁸ the plea of the foreign judgment having been obtained on a false affidavit, was overruled on the ground that it was a proper ground of appeal from the judgment, but could not be taken cognizance of by the English Court in which the judgment was sought to be enforced. The same view has sometimes been taken by the American Courts also. Thus it was held in *Tebbetts v. Tilton*³⁹ that where the fact of fraud was involved in the issue, it would not be a sufficient ground for impeaching the judgment. So also if the fraud ought to have been tried in the original action, it cannot be set up, even although it was unknown and undiscovered at the time of the trial.⁴⁰ In *Hilton v. Guyott*,⁴¹ it was held that "a foreign judgment *in personam* rendered in a court of a civilized country having jurisdiction of the subject-matter, in a cause involving the consideration of ordinary mercantile transactions between the parties, and in which the defendant appeared and took part in the proceedings, cannot be impeached when sued on here, although, at the trial, the defendant was denied the benefit of our rules of evidence and procedure, and although the judgment was based on false testimony and was erroneous."

On the other hand, it has sometimes been held in England also, that a foreign judgment obtained by the fraud of a party

³⁶ 30 L. J. Q. B. 100.

³⁷ 3 H. & N. 640.

³⁸ 16 L. T. 529.

⁴⁰ *Adams v. Adams*, 51 N. H. 386.

⁴¹

cannot be enforced in an action brought by him in an English Court, although the question whether the fraud had been perpetrated was investigated in the Foreign Court and decided in the negative. Thus in *Abouloff v. Oppenheimer*,⁴² a suit was brought on a foreign judgment, whereby defendant had been ordered to return certain goods to plaintiff or to pay her their value. The defendant replied that the judgment had been obtained by the plaintiff's fraud in fraudulently representing to the Foreign Court that the goods were not in plaintiff's possession; and it was held that the defence would be good, even although the question whether the fraud had been perpetrated, was investigated in the Foreign Court, and it was there decided that the fraud had not been committed. It was argued that the Foreign Court "had jurisdiction to examine the defence and did examine it, and came to the conclusion against the defendants." But Lord Coleridge said: "It has been suggested that there ought to be some limitation as to the rule, that the obligation arising on the judgment of a Foreign Court can be annulled by the defence that the Foreign Court has been misled, and not mistaken, if under any circumstances the fraud could have (been) brought under the notice of the Foreign Court. I do not think that the general proposition, broad as it is, is to be subjected to any limitation of that kind; and I am of opinion that the fraud of the person who has obtained the foreign judgment, is none the less capable of being pleaded and proved as an answer to an action on the foreign judgment in a proceeding in this country, because the facts necessary to be proved in the English Courts were suppressed in the Foreign Court by the fraud on the part of the person who seeks to enforce the judgment, which the Foreign Court was by that person misled so as to pronounce. Where a fraud has been successfully perpetrated for the purpose of obtaining the judgment of a court, it seems to me fallacious to say, that because the Foreign Court believes what at the moment it has no means of knowing to be false, the court is mistaken and not misled; it is plain that if it had been proved before the Foreign Court that fraud had been perpetrated with the view of obtaining its decision, the judgment would have been different from what it was." Lord Justice Brett went still further, and said that even assuming that the plaintiff's fraud was alleged by the defendants in the suit in the Russian Courts, and that they gave evidence in support of it, and even "gave the very same evidence which they propose to

⁴² 10 Q. B. D. 295.

adduce in this action ; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it ; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action." A similar view appears to have been taken in some other cases,⁴⁵ but, as pointed out by Mr. Pigott,⁴⁶ they "do not carry the principle any further than that enunciated in *Abouloff v. Oppenheimer*, the fraud in each case having been in effect perjury in the Foreign Court."

The difficulty which seems to be involved in the foregoing decision is, that although the Foreign Court may have investigated the defence of fraud when set up, and although it may have given a decision on that point, our courts will nevertheless entertain the same point over again. Mr. Pigott observes that the fraud alleged in this case was nothing different from an allegation of perjury, that if the Foreign Court had been misled by fraudulent statements, an appeal could lie from the judgment, and that "defendants in foreign judgment actions will only be too ready to allege this kind of fraud, and as it has been decided to be a good plea, it will invariably be resorted to, not so much for the purpose of establishing the obligation, but as a convenient method of obtaining a rehearing of the case upon its merits."⁴⁵ Referring to the argument on which the decision in *Abouloff v. Oppenheimer* rested, Mr. Vanfleet says: "According to that logic, a suit would never end. It could always be alleged that the court was deceived in the last suit tried. Why the Russian Court was not as competent as any other to determine what the truth was, or why it was not as competent to detect the false testimony of the defendant, that learned court did not point out. A court is always misled and deceived before it will render an erroneous decision. The defendant in the Russian Court had the opportunity to show any cause that existed why the plaintiff ought not to recover. If he failed to raise the proper issues, it was his own fault. He ought to have seen to it that the Court was not deceived."⁴⁶ As another sort of fraud, Crompton, J., observed in *Castrique v. Behrens*,⁴⁷ that "where by the contrivance of the plaintiffs the proceedings were such that the defendant had no

Blake v. Smith, 8 Sim. 303.
Bowles v. Orr, 1 Y. & Coll. 464.
 Pig. For. Jud. 111

⁴⁵ Pig. For. Jud. 110.
⁴⁶ Law. Coll. At. 586.
⁴⁷ 30 L. J. Q. B. 163.

opportunity to appear in the Foreign Court and dispute the allegations," it would be a good defence to the action on the foreign judgment.

231. Considerations of public policy are generally allowed to prevent a recognition of foreign judgments by the courts of a country when they are in contravention of the general policy and the principles of the Government of that country. This is admitted by almost every writer on International law, and has even been adopted in the Codes of some of the countries. M. Constant says that it appears certain that the tribunal giving the *exequatur* for the enforcement of a foreign judgment must assure itself that judgment *ne porte atteinte ni à la morale, ni à l'ordre, ni au droit public de l'Etat où elle doit être exécutée*.⁴⁸ The Italian Code of Civil Procedure expressly provides that before the grant of the *exequatur*, the court asked for it should examine *se la sentenza contenga disposizioni contrarie all'ordine pubblico o al diritto pubblico interno del regno*.⁴⁹ The Belgic Civil Procedure Code similarly requires the court to see if *la décision ne contient rien de contraire à l'ordre public, aux principes de l'ordre public belge*.⁵⁰ Such provisions are, however, not to be construed too literally. Speaking of the provision of the French Code, M. Moreau says: "*Elle n'implique qu'on doive refuser l'exequatur à tout jugement étranger qui aurait fait l'application d'une loi étrangère contraire à une de ces dispositions qui dans nos Codes sont à considérer comme d'ordre public. Tout ce qu'on peut et doit exiger, c'est que l'effet à produire par le jugement ne soit pas contraire à notre ordre public ; si cet effet ne blesse pas ses règles essentielles, il importe peu à la Souveraineté française que la loi dont il a été fait application à l'étranger soit, même sur un point intéressant l'ordre public, conforme ou contraire à notre législation*".⁵¹ The German Code of Civil Procedure, still more like the Indian Civil Procedure Code, provides that execution will be refused when the execution would constrain the doing of an act that is forbidden by the German law.⁵²

The Indian rule is enacted in still broader words, and provides that a foreign judgment to constitute *res judicata*

⁴⁸ Exe. Jug. Rtr. 8.

⁴⁹ Vide S. 941 (iv).

⁵⁰ Vide S. 10.

⁵¹ Mor. Eff. Int. Jug. 87.

⁵² Vide S. 661 (ii).

in this country must not sustain a claim founded on a breach of Indian Law. Mr. Pigott expresses it as his opinion that the defence in an action on a foreign judgment "must rest on the ground that the enforcement of the judgment would involve a violation of English public law." In *Rousillon v. Rousillon*,⁵³ the question was in regard to a contract made abroad in restraint of trade in England, and Fry, J., said: "It appears to me plain on general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made," and declined to enforce a judgment of the French Court which had condemned the defendant to pay damages for breach of the said contract. In *De Brimont v. Penniman*,⁵⁴ a decree had been given by a French Court to a Frenchman for maintenance against his father-in-law, a citizen of America, in accordance with a French statute providing for a needy son-in-law's maintenance in a certain case by the father-in-law. The New York Supreme Court refused to enforce the judgment on the ground that the French statute was not founded on general principles, but was local in its nature and operation, and of the character of a Police Regulation, being designed to regulate the domestic relations of those residing in France, and to protect the public against pauperism." It is quite settled that judgments proceeding on the revenue⁵⁵ or penal laws of another country will not be enforced. In *Folliott v. Ogden*⁵⁶ it was admitted that by the criminal sentence of attainder of one sovereign independent state, no personal disability to sue in another was created, although it had that effect in the State where the sentence was pronounced, and Lord Loughborough, C. J., further said that—"if the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they, by divesting the property of a person in that country, take away his right of action in England." Lord Watson, in delivering the judgment of the Privy Council in the recent case of *Huntington v. Attrill*,⁵⁷ said: "Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the state of New York. They had to construe and apply an international rule, which

⁵³ 14 Ch. D. 351.⁵⁴ 10 Blatch. 486.⁵⁵ *James v. Catherwood*, 3 D. and R. 190.
Planché v. Fletcher, 1 Doug.⁵⁶ 1 H. Bl. 135.S. C. On appeal, *Ogden v. Folliott*, 3 T. R. 734.⁵⁷ [1893] A. C. 155.

is a matter of law, entirely within the cognizance of the Foreign Court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The court appealed to must determine for itself, in the first place, the substance of the rights sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another state. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal. The general law upon this point has been correctly stated by Mr. Justice Story in his *Conflict of Laws*, and by other text writers; The rule has its foundation in the well recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the courts of any other country. Their Lordships have already indicated that, in their opinion, the phrase 'penal actions' which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic *forum*, does not afford an accurate definition. In its ordinary acceptation, the word 'penal,' may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well-known case and also by Chief Justice Marshall, who, in the *Antelope*³⁸ thus stated the

³⁸ 10 Wheaton, 123.

rule with no less brevity than force: 'The courts of no country execute the penal laws of another.' Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions 'penal' and 'penalty' when employed without any qualifications, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest. The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin v. The Pelican Insurance Company*.⁵⁹ By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the Commissioner of Insurance, an official entrusted with the administration of the Act in the public interest, one-half of it being payable into the state treasury, and the other to the Commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books, and the *dictum* by Chief Justice Marshall already cited, went on to say: 'The rule that the courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.' Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may

be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

Vice-Chancellor Wood in *Simpson v. Fogo*,⁶⁰ said: "I confess I yield to those judges constituting the court in *Castrique v. Imrie*, who considered that even in the case of a judgment *in rem*, if there were on the face of the judgment a perverse and deliberate refusal to recognize the law of the country which has conferred the property, every thing having been rightly done to acquire the property, that in such a case it would be the duty of a court to refuse to recognize the efficacy of such a judgment." But even where a foreign court, not of admiralty, has decided a case professedly but erroneously on our law, our courts are not concluded by such a decision.⁶¹ It is observed in Smith's Leading Cases in the note to the Duchess of Kingston's case⁶² that "there is considerable authority for saying that where a judgment of a foreign court is given in perverse and wilful disregard of the law of England when clearly and plainly put before it, it would not be enforced by the tribunals of this country, though the defect be not apparent on the face of the proceedings." This was the opinion expressed by some of the members of the Court of Exchequer Chamber in *Castrique v. Imrie*,⁶³ in which case, Cockburn, C. J., referring to the judgment of a French Court, said that "it professed to be acting on the law of England, not to be setting up the law of France as over-riding it. All that can be said, therefore, is that they have misconceived the English law, and that the judgment was erroneous. But the result of the authorities on this subject clearly establishes that a judgment *in rem* of a foreign tribunal, turning on a question of English law, cannot though erroneous be questioned by a court in this country any more than if, turning on the law of the country to which the tribunal belonged, it had been erroneous with reference to the latter."

⁶⁰ L. J. Ch. 249.
Herm. Comm. 579.
Castrique v. Imrie, L. R. 4 H. L. 414.

⁶² 2 Sm. L. C. 843.
⁶³ 8 C. B. (N. S.) 40.

232. Foreign judgments *in rem* stand on a footing somewhat different from that of domestic judgments *in rem* as well as from that of foreign judgments *in personam*. Their recognition and enforcement is still void of express legislative sanction, as while they are beyond the rule of *res judicata* enunciated in the Civil Procedure Code, there is nothing in the Indian Evidence Act to indicate that its provisions relating to judgments *in rem* can be construed so as to include foreign judgments. It will have been noticed, however, that on general principles of justice and equity they receive full recognition by the courts of British India on the analogy of the practice of the English courts. Several instances of such recognition have been referred to above in this chapter and in the preceding one. A foreign judgment *in rem* concerning movable property is "by the general consent of nations conclusive against the whole world." Dr. Story says: "In all these cases the same principle prevails, that the judgment acting *in rem* shall be held conclusive upon the title, and the transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned, and whether it be directly or incidentally brought in question."⁶⁴ Even foreign judgments *in rem* based on the revenue laws of the foreign country appear entitled to universal recognition, when there has been a vesting of property in consequence of them.⁶⁵ Mr. Herman speaks of it as a settled principle that probate proceedings "have no effect whatever in other States, and an administrator or guardian will not be recognized as a party beyond the territorial jurisdiction of the court from which he derives his powers. He is not even permitted to bring a suit jointly with a domestic administrator."⁶⁶

There is considerable authority, however, for holding that the adjudications of foreign courts in matters of probate jurisdiction, such as the proof of wills and the grant of administration or letters testamentary, are recognized as being of ubiquitous authority and universally conclusive.⁶⁷ In *Doglioni v. Crispin*,⁶⁸ it appeared that a foreign court had,

⁶⁴ *Wilkinson v. Hall*, 6 Gray. 568.
Taylor v. Phelps, 1 H. and G. 492.
LeChevelier v. Lynch, 1 Doug. 170.
Embree v. Hanna, 5 Johns. 101.
McDaniel v. Hughes, 3 East, 367.
Barney v. Douglas, 19 Vt. 98.

⁶⁵ *Hughes v. Cornelius*, 3 Sum. 600.
Bradstreet v. Neptune Ins. Co. 3 Sum. 600.
⁶⁶ *Horn v. Comm.* 366.
⁶⁷ *William v. Saunders*, 5 Cold. 60.
Tompkins v. Tompkins, 1 Story, 547.
⁶⁸ L. R. 1 H. L. 301.

on the death of a person domiciled within the local limits of its jurisdiction, found that he had died domiciled there and intestate, and that C was his natural son, and as such entitled by the law of that country to inherit his father's property. It was held that the Probate court in England was bound by the judgment of the foreign court, and had therefore rightly admitted C to be heard as contradictor to a will set up in the latter country as having been made by the decedent disposing of his personal property there. It was argued in this case that the litigating parties before the Probate court were not the same as those before the Foreign court, and that, at least, they did not appear sustaining the same character, the appellant litigating as a person entitled to insist on a will, while in the Foreign court she sued as the party in possession of the personal estate of the deceased. Lord Cranworth, however, did not feel the force of this objection and said: "The respondent is not insisting here on the Portuguese decision as a bar to the appellant's demand on the mere ground that it is *res judicata*, but on the ground that it is the decision of a court of exclusive jurisdiction, a decision which we are bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced." In *Niboyet v. Niboyet*,⁶⁹ even Brett, J., in his dissentient judgment said of a judgment on a question of status, that "it is, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognized as binding in all suits and by all parties. Such a judgment, where the jurisdiction of the court which made it is recognized, is treated as binding and final not only by the courts of the same country but by the courts of all countries."

Similarly, "it has been held in regard to bankruptcy proceedings that what is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere." This was laid down by Lord Mansfield in *Ballantine v. Golding*,⁷⁰ and recognized in *Hunter v. Potts*.⁷¹ These cases were followed in *Potter v. Brown*,⁷²

⁶⁹ Kenyon, C. J., said in this case: "On the general reason of the thing, no doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country where personal property may happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt resident here, though such

⁷⁰ 4 P. D. 2.
⁷¹ Cooke, B. L. 155.

| ⁷² 4 T. R. 182.
 | ⁷³ 5 East, 124.

in which Lord Ellenborough, C. J., after referring to them, said: "If the bankruptcy and certificate would have been a discharge of the debt in America, which it clearly would, it must, by the comity of the law of nations, recognized in the cases I have mentioned, be the same here." The same appears to have been held in the United States in *Peck v. Hibbard*.⁷³ Mr. Black says:⁷⁴ "According to the general doctrines of international law, the discharge of a contract by the law of the place where it is made is a discharge everywhere. Therefore if a contract is made and to be performed in a foreign country, and a regular discharge in bankruptcy has been obtained by the debtor resident there, the discharge will constitute a valid defence to the contract, wherever the creditor may be domiciled, or wherever the contract may be put in suit. But in respect to contracts not made or to be performed within the country granting the discharge, it could of course have no extra-territorial validity, as against non-resident creditors, unless they came in and took part in the proceedings. And in a case in Pennsylvania, where the question was upon a judgment rendered by a Bavarian Court in a proceeding in bankruptcy, allowing the claim of the plaintiffs against the bankrupt, but the latter being out of the country, the court never acquired jurisdiction of his person, it was held that an action of debt would not lie on the judgment."⁷⁵

The most familiar examples in England and America of foreign judgments *in rem* are the adjudications of Admiralty courts in cases of prize, collision, forfeiture, and the like. And these decrees, by the unanimous and emphatic voice of courts and jurists, are declared to be binding and conclusive all over the world. "The reasons," says Mr. Black, "why our courts accept such adjudications as final and conclusive are founded partly on the consideration that prize courts exist and discharge their functions under the recognition of the law of nations,—being thus, in some

property be in a foreign country. . . . During the progress of this business all these parties resided in England: that the defendant knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to Rhode Island to obtain an attachment of the bankrupt's property there, in violation of the rights of the rest of the creditors, which were then vested, but such an attempt cannot be sanctioned in a court of law."

sense, a species of international tribunals, exercising an authority which must be respected by all countries which give their adherence to the *jus gentium*,—and partly on grounds of necessity and propriety. Thus the United States Supreme Court has declared that the law on this point rests on three very obvious considerations: ‘the propriety of leaving the cognizance of prize cases exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in the courts of common law; and the impropriety of revising the decisions of maritime courts of other nations whose jurisdiction is co-ordinate throughout the world.’⁷⁶ But the rule thus established is not confined to adjudications in prize cases. It extends generally to all admiralty decrees proceeding from a court having jurisdiction of the *res*. Thus, where a French Court, having competent jurisdiction, in a proceeding *in rem*, delivered a judgment ordering the sale of a British ship then lying in the foreign port, under a lien for supplies furnished, it was held that the sale could not afterwards be impeached in England, in an action against the vendee, even though the person seeking to impeach it would, by the law of the latter country, have a preferential title to the chattel. And the same principle applies to judgments on a maritime lien for damages caused by a collision, and to adjudications ordering the sale of wrecks and property left derelict.⁷⁷

233. As in the case of domestic judgments *in rem*, it has been held in regard to foreign judgments *in rem* also, that it is no ground of objection to them, that they are erroneous, even though the error appears on the face of the proceedings. Thus in *Castrique v. Imrie*,⁷⁸ Lord Colonsay said: “It appears to me that we cannot enter into an inquiry as to whether the French Courts proceeded correctly either as to their own course of procedure or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were

⁷⁶ *Croudson v. Leonard*, 4 Cranch, 434.
Bl. Jud. 975.

⁷⁷ L. R. 4 H. L. 448.

right in their views of the English Law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship and did order the sale of the ship." In *The Helena*,⁷⁹ Sir Wm. Scott observed: "Although their notions of justice to be observed between nations differ from those which we entertain, we do not on that account venture to call in question their public acts. As to the mode of confiscation which has taken place on this vessel, whether by formal sentence or not, we must presume it was regularly done *in their way* and according to the established custom of that part of the world." An even stronger illustration is furnished by the case of *Armroyd v. Williams*,⁸⁰ in which the sentence of a French Prize court was held to be conclusive, although every consideration appeared to militate against the propriety of applying the established rule. But the court declared that, whatever might be done by foreign tribunals in reference to the settled principles of international law on the subject of the conclusiveness of prize adjudications, the courts of this country would not, for purposes of retaliation, depart from those principles.⁸¹

234. There are to be found traces in judgments, notably those delivered in *Custrique v. Imrie*, of an opinion that a judgment *in rem* is entitled to greater respect than a judgment *in personam*; or that defences in regard to which there is some doubt as to whether they can be raised to a judgment *in personam*, can certainly not be raised to a judgment *in rem*. Mr. Pigott thinks, however, that this opinion is "fallacious: for the only difference between the two judgments being one of extent, it follows at once that the same rules of defence must apply in the one case as in the other."⁸² It appears to be generally agreed upon that the pleas that may be raised against foreign judgments *in personam* with success will apply in regard to foreign judgments *in rem* also. Thus all foreign judgments *in rem* are so far examinable as to ascertain whether the court rendering them had jurisdiction of the subject-matter

4. C. Rob. 3.
2 Wash. C. C. 508.

81. Vide Bl. Jud. 974.
82. Pig. For. Jud. 149.

consistently with the law of nations.⁸³ In *St. Sure v. Lindsfelt*,⁸⁴ a judgment of divorce passed by a court in Sweden was held void by the Supreme Court of Wisconsin for want of jurisdiction, and Mr. Justice Cassoday in delivering the judgment of the Court said: "In this country it is prescribed by constitutional compact that full faith and credit must be given in each State to the public acts, records, and judicial proceedings of every other State; and yet it is well settled that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction, and if want of jurisdiction appear upon the face of the record, or is shown either as to the subject-matter or the person, or in proceedings *in rem*, as to the thing, the record will be regarded as a nullity."⁸⁵ The rule is certainly as strong, if not stronger, when applied to a judgment rendered in a court of a foreign country, towards which no such duty is enjoined, and especially where the jurisprudence of such foreign country is in no sense based upon the common law." In *Rose v. Himely*,⁸⁶ the United States Supreme Court said: "Can this Court examine the jurisdiction of a foreign tribunal? The court pronouncing the sentence, of necessity, decided in favor of its jurisdiction, and if the decision was erroneous, that error it is said ought to be corrected by the superior tribunals of its own country, not by those of a foreign country. This proposition certainly cannot be admitted in its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its Government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the court, then, is, of necessity, examinable, to a certain extent, by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it professes to decide must be considered. But, although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may right-

⁸³ *Imrie v. Castrique*, 8 U. S. B. N. S. 405.

⁸⁴ 33 Am. St. Rep. 50.

⁸⁵ *Thompson v. Whitman*, 18 Wall. 457.

Pennoyer v. Neff, 95 U. S. 714.

Simmons v. Saul, 138 U. S. 439.

Bartlet v. Knight, 3 Am. Dec. 36.

Starbuck v. Murray, 21 Am. Dec. 172.

Taylor v. Barron, 64 Am. Dec. 281.

Rape v. Heaton, 76 Am. Dec. 269;

Renier v. Hurlbut, 20 Am. St. Rep. 830.

⁸⁶ 4 Cranch, 267.

fully do what it professes to do, it is still a question of serious difficulty whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question whether the vessel condemned was in a situation to subject her to the jurisdiction of that court also examinable? This question, in the opinion of the Court, must be answered in the affirmative. Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter, which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn as prize-of-war a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned arising from its being within or without their jurisdiction, as well as the constitution of the courts, may be considered by that tribunal which is to decide on the effect of the sentence. Passing from principle to authority, we find that in the courts of England—whose decisions are particularly mentioned because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as is given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has in the given case jurisdiction of the subject-matter. The manner in which this subject is understood in the courts of England, may, then, be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted in examining

the jurisdiction of a foreign court by which a sentence of condemnation has been passed, not only in relation of the thing on which those powers are exercised, at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations, and by treaties. There is no reason to suppose that the tribunals of any other country whatever, deny themselves the same power. It is, therefore, at present considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case." The general rule as to a judgment *in rem* relating to a thing giving a title to it as against all the world is ordinarily stated with the qualification that that thing is situate within the jurisdiction of the court. Thus Mr. Herman observes that "when the court has jurisdiction to determine on the disposition of the thing and does in the exercise of that jurisdiction determine that the thing, and not merely the interest of any particular party in it, be sold or transferred, the title is perfect everywhere, and this is universally applicable to proceedings *in rem*."

Similarly, foreign judgments *in rem* are like those *in personam* impeachable for fraud. Thus Mr. Justice Story in *Bradstreet v. Neptune Ins. Co.*,⁸¹ says: "Supposing the proceedings before the Mexican tribunal to be, in all respects, unexceptionable, my opinion is that the allegations in those proceedings as to the appearance of the master (of the vessel) before the court, and his being heard before the decree of condemnation, would be conclusive on the parties, and would not be traversable, or re-examinable, in the present cause. But if the defence be that the proceedings were not merely irregular and illegal, but were founded in a positive fraud, and that, in point of fact, the whole record was but a tissue of false accusations and false statements and false proofs made up to cover the fraud in which the seizing and prosecuting parties were all confederate, I should think that evidence was admissible to show that the master never was summoned, never did appear, and never was heard before the condemnation, in order to establish *pro tanto* the fraud. I know of no case where fraud, if established by competent proofs, is not sufficient to overthrow any judgment, or decree, however solemn may be its form and promulgation."

⁸¹ Herm. Comm. 81.

Foreign judgments *in rem* have sometimes been held open to other pleas also, the most important being that they have not been passed without some regular proceedings, and are not against natural justice. Thus in *Bradstreet v. Neptune Insurance Co.*, already cited, Story, J., said: "There is another element which, it seems to me, constitutes an essential ingredient in every case where the sentence of a foreign court *in rem* is sought to be held conclusive, as to the title to the property and as to the facts upon which it professes to be founded. That element is, that there have been proper judicial proceedings upon which to found the decree; by which I mean, not that there should be regular proceedings according to the forms of our law, or even of the foreign law, but that there should be some certain written allegation of the offence, or statement of the charge, for which the seizure is made, and upon which the forfeiture is sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, may know what is the offence with which they are charged, and may have an opportunity to defend themselves and to disprove the charge. It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party—*castigatque, auditque*. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of

other nations, for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem* that some specific offence is charged for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification, or monition, acting *in rem* and attaching to the thing, so that the parties in interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs."

CHAPTER X.

BAR BY SUIT.

235. The doctrine of *res judicata*, as now recognized, directly forbids the retrial of an issue, and necessarily involves the bar of a suit brought on a cause of action which should have formed the basis of a prior suit and been tried therein. And this bar is held to apply even where the subsequent suit is for a claim or relief arising out of the same cause of action, and not asked in the former suit. Thus Mr. Wells in broad language lays down that "contestants are not allowed to split up a cause of action, even where they have an election of different remedies, into different actions, or to supplement an incomplete remedy they may have selected at the first by availing themselves subsequently of another."¹ So also Mr. Herman says: "When the cause of action upon which the judgment is rendered is entire, and therefore insusceptible of severance or apportionment, the estoppel extends to the whole, and it cannot be shown that any part was withheld from the decision of the court."² That a party shall not be allowed to split up an entire and indivisible claim and recover upon it in fragments in different actions, is itself palpably reasonable and is well enough settled. If a party divide a single and entire cause of action once, what limit is there but the caprice and the will of the party to endless divisions? For what depends upon the mere caprice or will of an adversary, may be said to be without limit."³ Similarly, Dr. Bigelow says: "Where a party has distinct causes of action against another, distinct in the sense that each would authorize relief by itself, he is not bound to unite them, though the causes of action exist at the same time and might be considered together. But where the supposed second cause of action is what may be termed a mere increment of the first, and not independent of it, the rule is different."⁴ The Supreme Court of Pennsylvania in enunciating the rule in *Sykes v. Gerber*⁵ said: "It is against the policy of the

¹ Wells Res. Jud. 197.² Logan v. Caffrey, 30 Pa. St. 196.³ Baker v. Baker, 75 Am. Dec. 243.⁴ Lucas v. LeCompte, 42 Ill. 308.⁵ Bancroft v. Winspear, 44 Barb. 209.⁶ Herm. Comm. 245, 246.⁷ Big. Estop. 160.⁸ 96 Pa. St. 179.

law to permit a plaintiff to prosecute in a second action for what was included in and might have been recovered in the first, because it would harass the defendant and expose him to double costs. This is so far modified that where claims are distinct, though all might have been recovered in the first action, it will not bar a second for one which was not demanded or proved in the first. But where the contract is entire, and there is a recovery upon such contract, the party cannot maintain a second suit even on clear proof that no evidence was given in the first as to part of the demand in controversy." Similarly, the New York Supreme Court in *Secor v. Sturgis*⁶ said: "It is entire claims only which cannot be divided within this rule, those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. . . . All demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the action."

The rule is not a recent one, but was recognized even among the Romans.⁷ Nor is the rule merely a technical one. In *Smith v. Jones*,⁸ the New York Supreme Court observed that "the principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice and not to be classed among technicalities. It was intended to suppress serious grievances." "There is no rule of procedure," said Mr. Justice Straight in *Hikmatulla v. Imam Ali*,⁹ "which is founded in better reason and good sense than that which prohibits persons who bring suits, from what is called splitting their demands."^(a) Speaking of the rule, Sir

(a) Sir Richard Garth, C. J., observed in *Pranada Dasi v. Lakhi Narain*¹⁰ that Sec. 43, however construed, "has done, and will do, a vast amount of injustice; and I am therefore particularly careful to give it a construction no larger than it will reasonably bear." The learned Chief Justice was strongly against the principle of constructive bar implied in the doctrine of *res judicata*, and formally enacted in Expl. II. of S. 13.

⁶ 16 N. Y. 548.
⁷ Dig. 44, 2, 7.
⁸ 15 Johns. 239.

⁹ I. L. R. XII All. 206.
¹⁰ I. L. R. XII Cal. 63.

Whitley Stokes says : “ Were the rule otherwise, a man might be sued repeatedly in respect of different parts of the same matter, and conflicting judgments might be pronounced regarding separate portions of the same property, included in the same cause of action. And as the value of the property claimed by the plaintiff determines the class of Judges by which a suit is cognizable and the remedies of the parties in an appeal, a suit might be split up so that each branch of it should be decided by a Judge of a lower class than that by which, with reference to the value of the whole property in litigation, it ought to be decided, and the right of the parties to appeal would be unfairly limited.”¹¹

236. The rule, however, which may be designated as that of bar by suit, though derived from that of *res judicata*, is in practice different from it in several respects, and the difference has important results in regard to its scope and extent of application. It is based exclusively on the ground of public policy, and cannot commend itself on the ground of the presumptive correctness of a former judgment, which may be urged in support of the doctrine of *res judicata*. As a direct result of this difference, this rule has no application where the former suit was in a foreign court. Another difference is that it is dependent entirely on the identity of the cause of action of which the rule of *res judicata* has, to a considerable extent, now freed itself. Then the bar in the case of this rule is created directly by the institution of a suit, and not as in the case of *res judicata* by the rendition of a judgment, and the rule therefore is allied as much to the rule of *res judicata* as to that of *res judicata*.

The Indian Legislature has, therefore, provided for the rule separately from the very first enactment of the Civil Procedure Code. Sec. 7 of the Code of 1859 thus laid down that “ every suit shall include the whole of the claim arising out of the cause of action. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained. The bar being absolute, the

Rule of bar by suit as enacted in India.

for the rule separately from the very first enactment of the Civil Procedure Code. Sec. 7 of the Code of 1859 thus

¹¹ Ang. Ind. Codes, 307.

language of the section was imperative, and a plaintiff could not reserve his right to sue again by alleging in his plaint in the first suit that he intends to bring a second suit for the portion omitted.¹² The same form has been retained in subsequent legislation, and thus though there was such a reservation in the former suit in *Maksud Ali v. Nargis Dye*,¹³ it was not even contended that it would bar the application of the rule of bar by suit. As an effect of the rule as enacted, a suit for rent in Company's Rupees when it was really due in Rupees of a higher value, was held to bar a suit for the difference, Trevor and Glover, JJ., observing that as the plaintiff "either omitted or abandoned the difference when he sued, or erred in his calculation, and claimed what the special appellants were willing to pay him as the entire sum due to him for rent, we think that he fairly comes within the purview of Sec. 7, Act VIII of 1859, and has 'omitted to sue' for a portion of his claim in the original suit, and cannot now recover it in a fresh suit."¹⁴ Their Lordships of the Privy Council held in *Buzloor Ruheem v. Shumsoonnissa*,¹⁵ that the section plainly included accidental or involuntary omissions as well as acts of deliberate relinquishment, and that the correct test in all cases of this kind was whether the claim in the new suit was in fact founded on a cause of action distinct from that which was the foundation of the former suit. The same had been held before, and their Lordships' decision has since been expressly followed in a considerable number of cases.¹⁶

In the present Code, the rule, in a more extended and complete form, is reproduced in Sec. 43, which accordingly provides as follows:—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. . . . If he omits (except with the leave of the court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted. . . . An obligation and a

¹² *Soonder Baboo v. Khulloo Mul.* II All. H. C. R. 90.

¹³ I. L. R. XX Cal. 322.

¹⁴ *Meer Mahomet v. Forbes*, V W. R. Act X, Rul. 90.

¹⁵ XI M. L. A. 551.

¹⁶ *Jade Ganes Chandra v. Ram Kumar*, III B. L. R. A. C. 265.

collateral security for its performance shall be deemed to constitute but one cause of action." The reference in this section to the splitting of the remedies was introduced for the first time, and it has been often attempted to explain the practical effect of this addition. In *Kalidhun v. Shiba Nath*,¹⁷ Field, J., in the order of reference to the Full Bench, said: "A 'claim' is a demand of right, a challenge of interest of something which is not in possession of the claimant. A remedy is the legal means to recover a right. . . . The remedy appears to be the mode of enforcing the legal claim. In this view, a case of more than one remedy seems to suppose more than one claim. The words 'more than one remedy' can scarcely mean a remedy against more than one person."¹⁸ The recovery of immovable property, and the recovery of mesne profits, are treated, not as separate remedies, but as separate causes of action. In mortgage cases we get more than one remedy.¹⁹ In the following cases also, perhaps, we find instances of more than one remedy in respect of the same cause of action. *Okhoy Coonar v. Mahatap Chunder*,²⁰ where a patnidar, who had previously obtained a decree for abatement of rent, was allowed to maintain a second suit for a refund of the excess rent paid before the institution of the suit for abatement; *Tarini Prasad v. Raghab Chundra*;²¹ *Tarini Prasad v. Khudumani Debia*;²² *Luchmun Sahoy v. Ramsarn*,²³ and *Routledge v. Hislop*.²⁴ In many cases there is an option of suing on the contract, or for breach of the contract, and in these cases there are more than one remedy, but the remedies are alternative. It is not very easy to define what constitutes a 'claim' as distinguished from a 'remedy,' for the former appears to include the latter to some extent. Doubtless the two terms were intended to overlap, and the second portion of Sec. 43 was added for more abundant caution and in consequence of the different form in which Sec. 2 of the old Code was drafted, when it became Sec. 13 of the new Code. A declaratory decree can scarcely be termed a 'remedy,' although there are cases, see *Tulsi Ram v. Ganga Ram*,²⁵ in which it is spoken of as a remedy. I can understand an

¹⁷ I. L. R. VIII Cal. 483.

¹⁸ *Sabeer Khan v. Kalli Das*, 1. W. R. 199.

¹⁹ *Doss Money Doss v. Jonman Joy*, I. L. R. III Cal. 363.

Emam Momtazooddeen v. Haran Chunder, XIV B. L. 408.

²⁰ I. L. R. V Cal. 24.

²¹ V B. L. R. 184.

²² V B. L. R. 187.

²³ XX W. R. 144.

²⁴ 2 F. & E. 549.

²⁵ I. L. R. 1 All. 252.

injunction being a relief or remedy, *Marsh v. Keith*,²⁶ but I do not understand how a decree, which declares a right merely and gives no relief, can be termed a remedy.' So also in *Ram Sewak v. Vakched*,²⁷ Tyrrell, J., in his judgment, observed that, "a remedy is a man's legal means of recovering or otherwise asserting a right to which he deems himself entitled, or of obtaining redress for a wrong. In Sec. 43, the word 'remedy' is used to denote the decree or decretal order with its proper legal results, which is the successful suitor's warrant for obtaining the relief he has achieved by his suit."

As to the scope of the section, there is a general unanimity of opinion that the claim and the remedy mentioned in it have reference to the cause of action litigated in the former suit.²⁸ The section can, besides, have an application only when there was a cause of action in existence at the time of the institution of the first suit. This was held in *Ahmad Khan v. Mehrkhan*,²⁹ by Sir Meredyth Plowden, who said, "Sec. 43 is not applicable where the former suit set up in bar has been dismissed because there is no cause of action. A premature suit is not within the purview of the section at all. What is contemplated in the second clause is a second suit advancing a claim supplementary to the first and in respect of 'the portion omitted or relinquished in the first suit.' When the cause of action arises, a second suit may be brought for the whole of the claim arising out of it, notwithstanding the dismissal of the first suit as premature, and it need not be for the same claim, or the same remedies as were sued for in the first plaint."

238. The section has been often held not to apply to claims of which the plaintiff was not aware at the time of bringing the first suit, because a right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a portion of his claim within the meaning of Sec. 43.³⁰ The same has been held by the Madras High Court repeatedly. Thus in

²⁶ 1 Dr. & Sm. 342.

²⁷ I. L. R. IV All. 501.

²⁸ T. K. Ummatha v. Kunhamed, I. L. R. IV

Mad. 318.

Pathum v. Ayissa, M. H. C. Su. Ap. No.

of 1882

And v. Thatha, I. L. R. X Mad. 347.

Naro Balvant v. Ramchandra, I. L. R. XIII

Bom. 326.

²⁹ 1901 P. R. No. 35.

³⁰ Amanat Bibi v. Imdad Hussain, L.R. XVI A

*raraqava v. Krishnasami*³¹ the plaintiff knew nothing of the alleged sale by the defendant's mother or of the acquisition by the Railway Co., and Kernan and Kindersley, JJ., said, "The provision in Sec. 43 as to omitting a claim clearly involves the idea that the plaintiff so omitting was at some time prior to the suit, aware or informed of the claim, or aware of the facts which would give him a cause of action. He, therefore, did not omit within the meaning of Sec. 43, to sue in respect of such claim, nor did he designedly relinquish it." The same was held by Best and Muttusami Ayyar, JJ. in *Ambu v. Ketlilamma*.³²

In *Doorga Nath v. Kalee Narain*³³ Mr. Justice Jackson by way of analogy observed, that "supposing that the plaintiff found, on re-entering into his own land, that the defendant, had retained fraudulently and wrongfully possession of certain lands, and brought a suit for recovery of possession, and it afterwards came to his knowledge what he did not know, at the time of bringing the first suit, that the defendant had retained other lands to which he is also entitled, it is conceivable that even in that case a second suit might be maintainable; because, if the plaintiff were debarred from bringing a suit in respect of the land as to which he was not informed of the wrong done until he had ascertained the whole wrong done to him by the defendant, he might be barred as to great part of his cause of action."

The same rule has sometimes been acted upon in the United States also. Thus where the plaintiff in presenting his demand, credited the defendant with a certain part of the general claim for which the latter had given an order on a third person, and recovered judgment, and afterwards discovered that the order had never been accepted or paid, it was held that he was not precluded from maintaining his suit for the amount so credited on the order.³⁴

So also in *Harris v. Vaughn*,³⁵ a subsequent suit for certain items of debt was held to be not barred by a prior suit in which they would have been included, if the defendant who was the plaintiff's agent had not fraudulently concealed them from the plaintiff. Mr. Freeman says, however, that "other cases may be cited in which exceptions have been recognized, but on examination they will, we think, be

³¹ 1. L. R. VI Mad. 344.

³² 1. L. R. XIV Mad. 23.

³³ XXIV W.R. 27.

³⁴ Kane
³⁵ 2 Tenn. Ch. 183.

found to be more correctly regarded as instances in which courts have, from considerations of hardship, refused to apply the law of merger, than as proper exceptions to it. Thus, recoveries have been sustained for causes of action or parts of causes of action not included in the former actions on account of the mistake or ignorance of the plaintiff,³⁶ but exceptions of this kind are not sustainable." Thus, it was held in *McCaffrey v. Carter*,³⁷ that a suit for certain chattels that ought to have been included in a former suit would be barred, even if they could not be included in that suit on account of the defendant's fraud.

239. In *Pattaravy v. Audimula*,³⁸ Mr. Justice Innes observed that "a reasonable construction must be put upon Sec. 7, and the words 'whole claim' understood with the qualification 'in so far as it is cognizable by the court in which the suit can be lawfully entertained.'" In this case, the plaintiff in the former suit had not included a claim for certain Inam for which a suit could not be brought in a Civil Court without the previous sanction of the Government, and a subsequent suit for the Inam was held not to be barred. Mr. Justice Innes observed that if at the time of a cause of action "arising to a plaintiff, or in the interval between that and a subsequent date, any part of his claims is not cognizable by the court in which the remainder of it is cognizable, it cannot, I think, be intended that he must postpone his suit for the cognizable portion of his claim until the court acquires jurisdiction over the portion at present uncognizable or be barred of all future remedy for the recovery of that portion." The Madras High Court had on the same principle held in *Subba Rau v. Rama Rau*³⁹ under the Code of 1859, that a suit for a certain portion of a property would not bar a subsequent suit for another portion of the same property, which was situate outside the local jurisdiction of the court that took cognizance of the former suit; and the decision was followed in *Pattaravy v. Audimula* by Holloway, J., who expressed, however, doubts as to its correctness. A contrary view was taken by the Calcutta

³⁶ *Winslow v. Stokes*, 67 Am. Dec. 242.

Baker v. Baker, 75 Am. Dec. 243.

Wy v. Kansas City R. R. Co., 74 Mo. 477.

W. Co. v. Alexander, 21 Iowa, 377.

³⁷ 126 Mass. 330.

³⁸ V. M. H. C. R. 419.

³⁹ 111 M. H. C. R. 376.

High Court in *Jumona Dassee v. Bamasondere*.⁴⁰ The point as to the local jurisdiction is not important at present as the decision of the Madras High Court was based on the ground that Secs. 11 and 12 of the Civil Procedure Code of 1859 were not imperative, but optional; and the corresponding sections of the present Code are worded differently, and do not require the sanction of a higher authority for the exercise of jurisdiction by the court in which the suit contemplated by them may be instituted. Even the Calcutta High Court held, however, that if the former suit were for the whole of the property, and the decree turned out void in regard to the property outside the Court's jurisdiction, on account of the sanction required by Sec. 12 not having been obtained, a subsequent suit for that property would not be barred, as in such a case there would be no relinquishment or omission of it in the former suit.⁴¹ Under the present Code the Allahabad High Court has held on the same principle, that a suit in a Revenue Court for rent will not bar a subsequent suit in a Civil Court to recover the amount of the rent from property hypothecated for it, the former suit not having been cognizable by a Civil Court, and the latter not cognizable by a Revenue Court.⁴² In *Narasinga Rau v. Venkatanarayana*,⁴³ a suit to recover the amount of a mortgage from the mortgagor as well as from the mortgaged lands had been brought in a court that had not jurisdiction over the lands, and it was dismissed on that ground as regards that land, and on another ground in regard to the defendant personally. The plaintiff then brought another suit for the recovery of the mortgage-money by a sale of the mortgaged lands in the court having jurisdiction over the lands, and it was contended that the suit was barred as the plaintiff must be taken to have intentionally relinquished that portion of his claim relating to the lands, so as to get the personal decree which alone the former court could give him. Sir Arthur Collins, C. J., and Handley, J., said: "The facts as to plaintiff's conduct in the former suit cannot bear that construction. So far from relinquishing that part of his claim relating to the land, he sued for enforcement of

⁴⁰ 11 W. R. 148.

⁴¹ *Grish Chunder v. Bungsee Singh* c. VII Cal. 739.

Lall, I. L. R.

⁴² *Banda v. Abuli*, I. L. R. IV All. 180.

Chunni Lal v. Bamsput, I. L. R. IX All.

⁴³ I. L. R. XVI Mad. 481.

the mortgage by sale of the mortgaged lands, and persisted in his claim until the hearing when it was disallowed. He had a right to sue the mortgagor for the mortgage debt in the court within whose jurisdiction the mortgagor resided, and the fact that he erroneously claimed in that suit relief against the lands which that court had no jurisdiction to give him does not, in our opinion, bring him within the bar of Sec. 43 of the Code."

English Courts also appear to act on that principle, and in the recent case of *Midland Railway Company v. Martin*,⁴¹ Wright, J., said: "The Magistrate had no power to deal with this part of the case; consequently the doctrine, that where a person has two alternative remedies in respect of the same subject-matter he is put to his election between them, has no application here."

240. The Section should otherwise apparently receive a liberal construction, so as to be in accord with the general principle on which it is based, and so as to secure the advantage which the rule has for its object. The rule has thus been held to apply not only to the parties to the former suit, but also to those claiming through or representing them. A suit for a portion of a claim not included in a former suit on the same cause of action has been held barred even when brought by a person to whom that portion has been assigned.⁴² In the case last cited the suit was by the assignee of a portion of a judgment for a separate judgment on that portion, and it was held barred by a former suit for the other portion of the judgment, on the ground that the judgment sued upon was an entire cause of action. The rule was held to apply even when the suit was by a probate judge against an executor on his probate bond for monies to be paid out in legacies and other claims, on the ground that the Judge, though a trustee for different claimants, had the sole legal interest in the cause of action, and parties whose claims were due but not taken into account in the suit would be barred.⁴³

⁴¹ [1893] 2 Q. B. 174.

⁴² *Graham v. Hall*, 11 S. and R. 78.
v. Mining Co., 13 Mich. 231.

Hopkins v. Stockdale, 117 Pa. St. 365.
⁴³ *Pinney v. Barnes*, 17 Conn. 420.

241. Nor is the rule restricted in its application to a suit technically so-called. It extends to counter-claims by a defendant also. Thus it has been pleaded that a portion of the claim, for which a suit will be barred by the rule, cannot be put forward as a set-off in a suit by the debtor,⁴⁷ because such a claim will not be legally recoverable, and it is only a demand legally recoverable from the plaintiff that may be set off.⁴⁸ So also, conversely, in a claim by a defendant for a set-off, the entire damages arising out of the cause of action must be claimed, as the defendant cannot afterwards bring a suit on the matter pleaded or any part of it.⁴⁹ Thus in a suit on a promissory note for value of goods, the defendant pleaded that the vendor had made a false representation as to the value, and a decree for a part of the note was held to bar a suit by the defendant for further damages for the representation.⁵⁰ So, also, a decision in the defendant's favour in a suit for work done under contract on his plea of imperfect performance, has been held to bar a suit by the defendant to recover damages for the non-performance.⁵¹ And this presenting of an entire demand as a defence to an action or as a set-off, and its partial allowance, will bar a suit for the residue, even though the entire demand or set-off was proved, and the residue not allowed simply on account of its exceeding the court's jurisdiction.⁵² In *Knorr v. Peerless Reaper Company*,⁵³ three promissory notes had been given for the price of a reaper, and in a suit on one of them, the defendant recovered damages to the full extent of the purchase money for breach of warranty, and this was held to bar a plea of breach of warranty in a subsequent suit on the remaining two promissory notes. Reese, C. J., said: "The amount of damages awarded by the court was equal to the purchase price of the machine. . . . It can hardly be supposed that under the rule stated in *Aultman v. Stout*,⁵⁴ this amount of damages could have been allowed, without taking into consideration the fact that these notes were outstanding, and were to be paid by plaintiff in error. . . .

⁴⁷ *r. Goodrich*, 21 Barb. 317.

⁴⁸ *Crosby v. Jeroloman*, 37 Ind. 277.

⁴⁹ *Bartells v. Schell*, 16 Fed. Rep. 341.

⁵⁰ S. 111 Civ. Proc. Code.

⁵¹ *Thompson v. Schuster*, 28 N. W. R. 858.

⁵² *Burnett v. Smith*, 4 Gray, 50.

⁵³ *O'Connor v. Vanhey*, 10 Gray, 231.

⁵⁴ *Simcox v. Zane*, 24 Pa. St. 212.

Inslee v. Hampton, 11 Hun. 156.

⁵⁵ 6 Am. St. Rep. 140.

⁵⁶ 15 Nel.

A careful examination of the answer filed in the suit upon the first note to mature, it seems to us, can result in no other conclusion than that it was a count for damages, by reason of a breach of warranty, which incidentally presented the defence of failure of consideration. The contract out of which the indebtedness arose was one and indivisible. It was entered into at one time, between the plaintiff on the one hand and defendant on the other, and upon one consideration. Plaintiff in errors' right of action upon it was also indivisible. He could not maintain a cross-action in the former case for his damages by reason of the breach of warranty, plead the execution of the other notes and his indebtedness thereon, recover damages to the full amount of his whole indebtedness upon the theory that the notes outstanding were negotiable and would have to be paid, and again, in this action, maintain the same defence. In this particular, his rights were adjudicated by the former action."⁵⁵ In British India, Sec. 111 of the Civil Procedure Code expressly provides that a set-off shall have the same effect as a plaint in a cross suit, so that a claim for a set-off may for the purposes of the rule be looked upon as a separate suit. It is probably on this very ground that a court can take cognizance of a claim for a set-off only when it does not exceed the pecuniary limits of the court's jurisdiction.

The contrary was held in England in *Mondel v. Steele*,⁵⁶ in which a suit on a breach of contract to build a ship for damages accruing subsequent to the delivery of the ship was held to be not barred by a judgment in defendant's favor in a former suit for price of the ship, in which a deduction had been claimed and allowed on account of the same breach. Parke, B., said: "Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered But after the case of *Basten*

⁵⁵ Geiser Threshing Machine Co. v. Farmer, 27 | Minn. 428. ⁵⁶ 8 M. and W. 858.

v. Butter,⁵⁴ a different practice, which had been partially adopted before in the case of *King v. Boston*,⁵⁵ began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the case, and the work in consequence of the non-performance of the contract in the other, were diminished in value In all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more." It is now settled, however, even in England, that if the vendee had obtained a deduction from the price on account of the breach of warranty, he could not afterwards sue upon the warranty, although the first allowance was not adequate,⁵⁶ and even though a suit for breach of warranty will not be barred by a judgment in plaintiff's favor in a suit for the price, if in that suit the breach is not pleaded as a counter-claim or ground of recoupment.⁵⁷

It has been alleged sometimes by way of exception "that if a fact or state of facts be set up in the first action merely as a defence, and not as the foundation of a claim for affirmative relief, it will not prevent the same from being used as a counter-claim in a subsequent suit."⁵⁸

(B) Thus in a recent case in Minnesota,⁵⁹ a chattel mortgage was given to secure two promissory notes; the mortgagee sued the mortgagor to recover possession of the mortgaged property; the defendant alleged, as a defence only, that there was a failure of consideration for the notes and mortgage, and the judgment that was rendered in the defendant's favour, was held not to bar a counter-claim based on such failure of consideration, in a suit on the notes brought by the same defendant against the same plaintiff.

⁵⁴ 7 East, 479.

⁵⁵ 7 East, 481 (n).

⁵⁶ Benj. Sales, 906.

Burnett v. Smith, 4 Gray, 60.

Batterman v. Pierce, 3 Hill, 171.

v. Brown, 12 Md.

⁵⁷ Barth v. Burt, 43 Barb. 628;

Cook v. Mowley, 13 Wend. 277.

Earl v. Bull, 15 Cal. 421.

⁵⁸ Osborne v. Williams, 40 N. W. Rep. 166.

The weight of authority is, however, in favor of the contrary view, which has been held in a number of cases.⁵⁵

242. The application of the bar by suit, like the Cause of action and its identity on which the application of bar by suit depends. rule of *res judicata* under the Code of 1859, depends entirely on the identity or rather the unity of the cause of action. Some reference has been made to the cause of action and its identity in Secs. 9 and 148. The question involves considerable difficulty, however, and unanimity has not been arrived at as to some of its aspects. The expression cause of action, in its strict and scientific sense, signifies merely the act (including omission) that infringes any right of another person, and gives him a secondary right for seeking proper relief or redress for that infringement. In this sense, a tort or a breach of contract is an entire cause of action, altogether independent of the right or title infringed, and the contract or other circumstances giving birth to it. Practically, however, the expression cause of action has always been used and understood in England as well as in this country in a broad sense, so as to include in it not only the act constituting the infringement of a right, but also that right itself, and even the circumstances giving birth to that right. Thus in *Harjeebun Doss v. Bhugwan Doss*,⁶⁰ Phear, J., said: "I venture to think that in all cases the English Courts have held that the cause of action is only complete when the facts out of which the plaintiff's right immediately arose are comprehended in it, as well as the facts which constitute its infraction The inconsistencies of decision of which Mr. Justice Holloway complains⁶¹ do not appear to exhibit an oscillation between and including of the 'ground of origin of the right' on the one side, and an excluding of it on the other, but rather manifest themselves in the differing quantities of that ground, which it was thought necessary in the various cases to take in The diversities of decision are all referable to the practical difficulty which so often presents itself of determining what is the immediate proximate cause of the plaintiff's right as distinguished from that which is prior and more remote." The contrary view was, no doubt, adopted for the purposes of the rule relating to the service of writs, in *Vaughan v.*

⁵⁵ Patrick v. Shaffer, 84 N. Y. 423.
v. Varney, 10 Gray, 231.

⁶⁰ VII B. L. R. 110.

⁶¹ Vide *DoSonzza v. Colos.* III M. H. C. R. 407.

⁶² on a conference of all the Judges of the three Common Law Courts that are now represented by the Queen's Bench Division of the Supreme Court of Judicature, England. The popular use of the expression has not disappeared, however, and even recently Esher, M. R., in *Read v. Brown*⁶³ said: that 'cause of action' had been defined in *Cooke v. Gill*,⁶⁴ as every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, "and I think that the definition is right."

Nor is this use and the difficulties incidental thereto peculiar to the English system of jurisprudence. Bonnier says: *que la jurisprudence est placée entre deux écueils: on bien donner trop de généralité à la cause, ce qui ramènerait aux inconvénients des actions intentées, 'non adjecta causa' chez les Romains, ou bien donner à la multiplicité des procès une extension déplorable.*⁶⁵ Lacombe says *que cet arbitraire ne résulte que de l'abandon des principes*; but even he after defining the expression cause of action as *le fait juridique qui légitime l'action et lui sert de base*, observes that difficulty arises from the fact that the expression has not an absolute and invariable signification, that it can be applied with the *exactitude* to several elements of the *procès*, and that the so-called cause *procède à son tour d'autres causes plus éloignées*, and that there is no difficulty in enumerating the different causes of a *demande*, *mais le doute commence lorsqu'il faut reposer son choix sur l'une d'elles, pour dire; voilà la cause, la cause immédiate de la demande.* In almost the same words, Mr. Justice Holloway in *DeSouza v. Coles*,⁶⁶ said: "The words *cause of action* may have either the restricted sense of immediate occasion of the action or the wider sense of necessary conditions of its maintenance. In one sense it is the mere matter of fact, the failure of the defendant to do or forbear from doing, to give, or make good, that which the plaintiff's right entitles him to insist upon. In the other, it is this matter of fact *plus* the right resident in the plaintiff." In this country, Mr. Justice White, in delivering the judgment of the Calcutta High Court in *Jibunti Nath v. Shib Nath*,⁶⁷ observed, that "a cause of action consists of the

⁶² L. R. 10 C. P. 47.

⁶³ 22 Q. B. D. 131.

⁶⁴ L. R. 8 C. P. 107.

⁶⁵ Bon. des preuves, 874.

⁶⁶ III M. H. C. R. 406.

⁶⁷ I. L. R. VIII Cal. 822.

circumstances and facts, which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief, or to some part of the relief, prayed for ;” and this observation has since been quoted with approval by other judges.⁶⁸ Whichever view be taken however of the expression, the cause of action, to ascertain its identity, is to be gathered from the facts stated in the plaint. Mr. Justice White thus added, that the cause of action has “to be sought for within the four corners of the plaint.” It was contended against this, that the court must not confine itself to the claim made in the two suits in judging whether the 43rd section of the Code had been infringed, but ought to travel outside the statements contained in the plaint and see how the facts stood upon the finding of the court in the first suit, but the learned Judge said : “The argument is this, that, inasmuch as the cardinal allegation was disproved upon which was grounded the plaintiff’s title to the limited relief prayed in his first suit, and inasmuch as the Subordinate Judge held the plaintiff not to be in possession at that date, it follows that the plaintiff ought, in his first suit, to have brought a suit praying not only for a declaration of title, but also for an award of possession, and that not having done so he has split his remedies. I cannot agree that this is the correct test. The question to be determined turns not upon what was the proper suit for the plaintiff to have brought, or the proper remedies for him to have applied upon, having regard to the facts as found upon the trial of the first suit, but upon whether the causes of action in the two suits are one and the same, or are distinct. It is contended that, in the case of *Buzloor Ruheem v. Shumsoonissa Begum*,⁶⁹ their Lordships, in deciding that the plaintiff had omitted in her first suit a portion of his claim, founded their judgment upon the evidence in the suits and not upon the facts alleged in the pleadings. But this does not appear to be so. The omission of a portion of the claim from the first suit became apparent from comparing together the plaints in the two suits. It was then perceived that the causes of action in the two suits were the same, and that the Government paper sought to be recovered in the second suit was merely an item omitted from the plaintiff’s demand in the first suit.’

⁶⁸ *Nono Singh v. Anand Singh*, I. L. R. XII Cal. 294. | ⁶⁹ XI M. L. A. 551.

243. As to the unity of a cause of action, it may be at once observed that every tort is an independent and indivisible cause of action. Distinct torts, even though more or less connected, give rise to distinct causes of action, and a second suit will not be barred even though the former suit might have embraced both the torts,⁷⁰ or the tort on which the second suit is based occurred prior to the first suit.⁷¹ On the other hand, every tort can be the foundation for only one claim for damages ; and an entire claim arising from a single tort cannot be divided and made the subject of several suits, however numerous the items of damage may be. The rule is absolutely settled, that all the damage resulting from a tort must be claimed in one suit, and that a suit for some of it will bar a suit for the residue. Thus in a case of a wrongful conversion of a pledge by a creditor, the conversion gives "the plaintiff the right to reclaim it in several forms of action ; but he cannot sue for the price received for a part of them, and for the other part in kind, or for damages for the wrongful conversion of it. . . . If he did not recover enough, the fault was the adoption of the incomplete remedy, or in the result of it, and he cannot sue again. . . . The rule that prevents him from splitting up his cause of action into several fragments takes away his right of action for the residue entirely. Having once claimed, by action or defence, a part of an undivided subject-matter, the law allows him no remedy for the other part, else there would be no limit to litigation."⁷² The dismissal of a suit for damages for certain statements in a libel was held in *Macdougall v. Knight*,⁷³ to bar a subsequent suit complaining of other statements in the same libel, Lord Justice Fry observing that "both actions are for libel contained in a pamphlet, and, therefore, I conclude the cause of action is the same. In my opinion, it is impossible that two actions should be properly brought in respect of the same libel. The injustice of allowing a litigant to select one portion of a libel as the ground for one action and another as the ground for a second action, and so on indefinitely, is obvious. The whole publication would be before the jury in each case, and it would be quite impossible for the jury in each case to separate the damages due to the particular part of the libel relied on in that

⁷⁰ *White v. Moseley*, 8 Pick. 356.⁷¹ *Mahabear Sing v. Rambhajan Sah*, 1 L. R. XVI. Cal. 545.*De La Guerra v. Newhall*, 55. Cal. 21.⁷² *Simoes v. Zane*, 24 Pa. St. 243.⁷³ 24 Q. B. D. 1.

case from the damages arising from other parts of the libel. I think, therefore, that a plea of *res judicata* would succeed." Thus a suit for malicious prosecution will bar a suit for slander, consisting of preferring the charge on which the malicious prosecution took place; or in an action for malicious prosecution, the plaintiff is entitled to recover damages not only for his unlawful arrest and imprisonment, and for the expenses of his defence, but for the injury to his fame and character by reason of the false accusation.⁷⁴

A tort does not consist always of a single act, and may like an offence under the Indian Penal Code often consist of an aggregate of acts. Thus Mr. Herman observes that "the rule is, that all acts of the same nature, performed at the same, are regarded as one act in law, and cannot be made the object of several and separate actions. Where they are continuous instead of being simultaneous, the same rule applies, unless it be shown by proof that they are distinct causes of action."⁷⁵

244. As a general rule, if the damage is caused by the same act to several rights or properties, there will be only one tort and therefore one cause of action. The real difficulty in such cases arises, when on account of the difference of the rights or of the distance of the properties, or of the different character of the damage caused or of the different times of its accrual, it is doubtful whether the damage is caused by the same tort, or by different acts each constituting a separate tort. Thus Sir James Colville, in delivering the judgment of their Lordships of the Privy Council in *Buzloor Ruheem v. Shumsoonnissa*⁷⁶ said, "The cause of action in the former suit seems to them to be the refusal by the husband to restore, or his misappropriation of, the wife's property, which she says she intrusted to him. There is nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand. . . . If she was justified in instituting a separate subsequent suit for this particular Company's paper for Rs. 10,000, she would have been equally justified in making each one of the Company's papers which are comprised in the 'property suit' successively

⁷⁴ *Shelden v. Carpenter*, 55 Am. Dec. 301.
Rockwell v. Brown, 38 N. Y. 207.

⁷⁵ *Herm. Comm.* 250.
⁷⁶ *XI M. I. A.* 605.

the subject of an independent suit." On the same principle, Sir Barnes Peacock in delivering their Lordships' judgment in *Pittapur Raja v. Suriya Rau*⁷⁷ observed that "the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action."

The same rule is recognized in the United States also. In *Fulton v. Matthews*,⁷⁸ the New York Supreme Court said: "The seizure of the bed and the bed quilts which then lay on the bed was one single indivisible act, and the plaintiff ought not to be permitted to vex the defendants by splitting up his claim for damages into separate suits for each article so seized. . . . Suppose a trespass or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel." It would certainly be hard on the wrongdoer and on the courts, and through them on the public to allow that. In *O'Neal v. Brown*⁷⁹ the Alabama Supreme Court said, "The principle is that where a tort is committed by taking several chattels at one time, it gives but one cause of action, if they belong to one person, and the chattels were in his possession at the time, and he cannot be allowed to split it up and bring separate suits for separate articles. Nor can it make any difference that he was possessed of some as trustee, and of others in his own right, for the legal title to all and the possession was in him, and there being but one tort to the possession of one person, it gives, and indeed it can give him, only one cause of action, and that is merged when a recovery has been had upon it." In such a case, a suit for any of them in trespass or in trover will bar a subsequent suit in any form.

245. The general principle being that in cases of tort, the cause of action is the act that causes the damage, and not the right, title or property to which the damage is caused, nor the damage itself, the circumstance of the properties damaged being distinct from each other is immaterial. Thus, where a house and shop were burnt by the same fire, through the negligence

In suits for damages for injury to several properties their number or distance from each other does not affect the unity of cause of action.

of the defendant's servants, a suit for damages by the burning of the shop was held to bar a suit for the destruction of the house, to which the fire had extended from the shop, although the second suit was for the benefit of an Insurance Co., which had paid to the plaintiff the amount of a policy of insurance on the house.⁸⁰ In *Pierro v. St. Paul Ry. Co.*,⁸¹ Dickinson, J., in delivering the judgment of Minnesota Supreme Court said: "The former recovery of damages was only in respect to the twenty-two feet, but that would operate as a bar to a subsequent action to recover damages for injury to or upon the adjacent forty feet, caused by the same tortious acts of the defendant. The trespass now complained of in respect to the whole sixty-two feet was identical with the entry and possession alleged in the former action as to the twenty-two feet. The defendant's trespass and injury upon the whole tract of land was a single and indivisible tort, for which the plaintiff's right to recover damages was entire and indivisible. One may not split an entire complete cause of action, and have several recoveries of damages therefor."

Nor will the rule be different if the properties damaged are at a distance from each other. Thus if a fire is started by a locomotive engine under such circumstances as to make its owner answerable, all damages resulting to one person by the act must be recovered in one suit, although the fire was communicated to two tracts of land situate at considerable distance from each other.⁸² In *Beronio v. Southern Pac. R. R. Co.*,⁸³ a suit to recover damages for the construction of a railway in front of a lot in block 20 was held barred by a former suit for damages suffered by the plaintiff from the construction of the railroad in front of the plaintiff's lot 19, on the ground that all the damages suffered by the plaintiff from the location of the road constituted a single indivisible cause of action, and the California Court said: "We think there was no error in the rulings or instructions of the court in this behalf, so far as relates to any damage accruing to either of plaintiff's lots prior to and up to the time of filing his complaint or making his settlement in the former action. The elements of his damage up to that time may have been multifarious, but the cause of it was a unit,—the construction and operation of a single railroad which was complete

⁸⁰ *Trask v. Hartford & N. H. Railroad*, 2 Allen, 331.
⁸¹ 12 A. M. St. Rep. 673.

⁸² *Knowlton v. N. Y. and N. E. R. R. Co.* 147 Mass. 606.
⁸³ 21 Am. St. Rep. 57.

at the time. The fact that it damaged two lots belonging to the same man, at the same time and by the same means, no more created two causes of action than if two horses belonging to the same man had been killed by a single collision with a locomotive, and this has been held to constitute but a single cause of action.³⁴ In case of tort, the question as to the number of causes of action which the same person may have turns upon the number of the torts, and not upon the number of different pieces of property which may have been injured. Each separate tort gives a separate cause of action, and but a single one."

246. It has sometimes been held that the same wrongful act may in some cases occasion several distinct injuries. Thus damage to goods and injuries to the person, although caused by the same act, have been held to constitute infringements of different rights and to give rise to distinct causes of action. Thus in *Brunsdon v. Humphrey*,³⁵ the majority of the court held that when a person driving in a cab came into collision with a van of the defendants through their servant's negligence, a suit by him for damages for injury to the cab would not bar a suit by him for injuries to his person. The decision proceeded on the ground of the two injuries constituting distinct causes of action, and Brett, M. R., said: "The collision with the defendants' van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods; therefore the plaintiff is at liberty to maintain the present action." Bowen, L. J., did not adopt that reasoning, and while concurring in the conclusion as to there having been distinct causes of action, rested his decision on other grounds. He said: "Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be

³⁴ *Branonburg v. Indianapolis Ry. Co.*, 74 Am. Dec. 270. ³⁵ 11 Q. B. D. 141.

founded upon one act of the defendants' servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant." Lord Coleridge, C. J., dissented altogether from the decision of the majority, and expressed his concurrence with the decision⁸⁵ by Pollock, B., and Lopes, J., in the court below. He admitted that the injury done to the plaintiff was in respect of different rights, but said, "that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same: it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn." The view of the Master of Rolls does not appear to have been followed in any case. Yet in *Darley Main Colliery Co. v. Mitchell*,⁸⁶ Lord Bramwell said: "It is a rule that when a thing directly wrongful in itself is done to a man, is itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of the one blow." The decision in *Skoglund v. Minneapolis Street Ry. Co.*⁸⁷ appears to have proceeded on the same ground. In that case a husband and wife travelling in a railway carriage were injured by the same accident or act of negligence of defendant; and a suit by the husband for the injuries to his person was held not to bar a suit for compensation for the loss of the services and the society of the wife resulting from the injuries caused to her at the same time, and for the expenses incurred in providing her with physic. Gillfillan, C. J., in delivering the judgment of the Minnesota Supreme Court, said: "Where a cause of action arises from a wrongful injury, it arises at once; and in such case the sub-

⁸⁵ 11 Q. B. D. 712.
⁸⁶ 11 App. Cas. 144.

⁸⁷ 22 Am. St. Rep. 733.

sequently ascertained or developed consequences of the injury are items that might exist without them. But in an action by a husband on account of an injury to his wife, the consequences of loss of her society or services are not items of damages pertaining to an already existing cause of action, or to a cause of action which might exist without them, but they are essential to the cause of action itself, which cannot arise until such consequences have followed the injury. If it could be said that the plaintiff's cause of action in his first action arose upon the negligence alone, then all the injurious consequences of that negligence, the injury to his person, the loss of his wife's society and services, caused by the injury to her person, might be regarded as items of damage in that cause of action. But no cause of action could accrue upon the negligence alone. That cause of action accrued only upon injury to his person caused by the negligence, and when they concurred, his cause of action was complete. The loss of his wife's services had no connection with that injury. That cause of action was not a consequence of it, and not an item of damage pertaining to it. His right to recover for such loss was independent, and would have existed had that cause of action not accrued."

In the United States, it appears to be generally held that when the rights of different persons, or of the same person in different capacities are violated, there will be a separate cause in respect of each person or each capacity of the person; the same person in the latter case being considered as if he were two distinct persons. A suit for damages by a partnership has been held not to bar a suit by a partner for injuries caused to him by the same act.⁸⁸ In explanation of this view, the Missouri Supreme Court, in *Duffy v. Gray*,⁸⁹ said: "This action is for a personal injury to the character of the plaintiff, and the former suit was for a joint injury to the trade and business of the firm of D. and K. The members of the firm could have no legal interest whatever in the personal character of each other." A suit by a person for loss of his child's services occasioned by an injury to the child through the negligence of the defendant's servant has been held not to bar a suit by him as the child's administrator for such damages as the child would have recovery for the same injury,⁹⁰ nor would a suit by the father be barred by a former suit which the son himself

⁸⁸ *Taylor v. Manhattan Ry. Co.*
6 N. Y. Sup. 465.

⁸⁹ *Bradley v. Andrews*, 51 Vt. 525.
Karr v. Parks, 44 Cal. 46.

brought, by the father as next friend. On similar principles, in *Kronshage v. Chicago, M. and St. P. R. Co.*,⁹¹ a suit for damages for goods destroyed by fire, while in defendant's hands as a carrier was held not to bar a suit for goods destroyed by fire, while in such defendant's hands as a warehouseman, the court observing that "in the former action, the defendant was liable though not negligent, in this action the defendant is not liable unless the loss was caused by his negligence. Hence the two causes of action are entirely different. . . . Under all the authorities, the claims in the two actions do not constitute one entire and indivisible cause of action, but separate and distinct claims, for which separate suits may be maintained."

247. It is quite settled, however, that the accrual of separate damages from the same tort will not give a separate cause of action for a subsequent suit. The fact that the damages claimed in the second suit had not become apparent when the former suit was decided will not allow of the institution of the subsequent suit,⁹² even though that damage be caused by an unusual freshet.⁹³ Unforeseen and improbable injuries resulting from any act are, equally with existing and probable injuries, parts of an inseverable demand. Thus a person claimed damages for battery, and after that, parts of his skull came out, and a suit for the damages thus occasioned was held to be barred, as it was not alleged to result from a fresh act.⁹⁴ A subsequent suit on the same tort for extra damages will be barred, however unforeseen or aggravated may be the new injuries attributable to the old act.⁹⁵ In *Adm'r v. Clarendon*,⁹⁵ a suit by a father for damages resulting to himself prior to the suit by an injury to a minor child, was held to bar another suit for subsequent loss of services and other damages developed after the first suit was instituted.

In *Nil Monee Singh v. Issur Chunder*,⁹⁶ the plaintiff having been induced to take a *putnee taluq* settlement at a certain rent by fraudulent and false representations as to the lands alleged to be comprised in the taluq, sued on that ground to recover a part of the consideration money and the excess rents paid, and to obtain an abatement of the same proportionate

⁹¹ 8 Cal. Feb. 1854, 11 Cal. 391.
⁹² 7 Vt. 407, 43 Iowa 75.

⁹³ *Vatson v. Van Vator*, 4 Ohio 75.
⁹⁴ *Butler v. Beale*, Salk 31.

⁹⁵ 15 Vt. 23.
⁹⁶ 12 W. R. 121.

part of the rent for the future. He got a decree for the amount sued for, but even though the claim for abatement was rejected, a subsequent suit by him for the excess rent he had to pay since the first suit was held barred, on the ground that that as well as all other future damages should have been claimed in the former suit. Mr. Justice Phear (with whom Bayley, J., concurred) said: "The plaintiff's present contention amounts to this, that whenever the cause of action is such as to produce a successive recurrence of damage, then the person injured may bring a fresh suit on the occasion of the accrual of each portion of such damage. But I think this is clearly incorrect. In many cases of wrong, no doubt, the cause of suit is not complete until actual damage has ensued; but when once the cause of suit is matured, the subsequent occurrence of further damage, whether after or before this has been adjudicated upon, does not originate a fresh cause of suit. Were it otherwise, litigation would have no end, for I suppose that in very few cases does the damage flowing from a wrong or a breach of contract cease with one event."

It has been held on this principle that a person suing for the value of cattle illegally taken away should include in his plaint whatever claim he wishes to make in respect of damages caused to him by the defendant's wrongful act, and cannot afterwards maintain another suit for any damages which he might have claimed in the former suit.⁹⁷ In *Shaikh Panju v. Oodoy*⁹⁸ it was argued that the claim for damages arose out of a different cause of action, namely, the detention and not the seizure, of the cart and bullocks, and that the plaintiff was entitled, at least to recover such damage as accrued subsequent to the institution of the former suit for the recovery of the cart and bullocks; but Ainslie, J., in delivering the judgment of the court said: "There is no such detention as would constitute a separate cause of action; it is only the consequence of the seizure. There was nothing to prevent the plaintiff from asking for, or the munsif from awarding, such compensation as should entirely satisfy the plaintiff's claims against the defendant; and although the amount of compensation might be regulated by the period

⁹⁷ On the same principle it was held in *Leach v. Maresfield* that a continuation of an illegal mortgage was a tort, but that the debt was not actionable on the grounds given in the text.

of detention, the right to sue, or cause of action, began when the property was wrongfully seized, and not at any later date." The facts in *Hite v. Long*¹⁰⁰ were the same, and the Virginia Court of Appeals held that a suit for the horse taken away by the defendant would bar a suit for damages suffered from the stopping of the waggon, as all that the defendant did was but one tortious act.¹ In *Saem v. Kamaluddy*² the first suit was for the value of the fish taken by the defendants by force on the day of their dispossessing the plaintiff of his tank, and the second suit was for subsequent mesne profits. It was contended that the former suit was not for mesne profits, and that a fresh cause of action arose each time the profits of the tank were received by the defendant, but the contention was over-ruled, and Jackson, J., in delivering the judgment of the High Court, pointed out "that the previous suit as well as the present were really suits for damages; and that the previous suit and compromise ought to have included all claims of the plaintiffs arising out of the dispossession from the tank."

In *Whitney v. Town of Clarendon*,³ the majority of the Supreme Court of Vermont held the same. The Chief Justice contended that there could not have been any recovery for the damages claimed in that suit in the first suit because it had not arisen then. Such a contention is clearly untenable, however, as "no case can arise involving claims for serious injuries to the person in which the assessment of damage can be otherwise than imperfect and unfair. In the majority of cases, defendants must pay for damages which never develop, while in the minority, the most serious injuries must be borne without compensation." The decision in *Nicklin v. Williams*⁴ also proceeded on the same principle; Parke, B., having said in the judgment of the Court, that "for this wrong the plaintiff would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong." This decision was approved by Lord Westbury in *Bonomi v. Blackhouse*,⁵ and by the majority of the Court in *Lamb v. Walker*.⁶ After

¹⁰⁰ 18 Am.

¹ 36 N. J. L. 213.

² XXII W. R. 424.

³ 46 Am. Dec. 150.

¹⁰ Ex. 259.

⁹ H. L. Cas. 503.

⁸ Q. B. D.

the decision of the house of Lords in *Darley Main Colliery Co. v. Mitchell*⁷ it must no doubt be considered overruled, but only on a point of the law of torts, on the point of an excavation in one's own ground not giving a cause of action to the owner of adjoining land for the deprivation of the support he is entitled to, till the occurrence of actual subsidence and consequent damage. The decision in *Bonomi v. Blackhouse* is authority only for the proposition that no action can lie for the excavation alone, and that the damage resulting from the excavation, and not the excavation itself, is the cause of action, and that every fresh subsidence even though resulting from the same excavation is a fresh cause of action. Nor does their Lordships' decision in *Darley Main Colliery Co. v. Mitchell* go beyond that, and in fact in that case there appears to have been a further cause also—a fresh removal of some coal—of the fresh subsidence. Lord Halsbury, L. C., in his decision in that case said: "The defendant has originally created a state of things which renders him responsible if damage accrues; if by the hypothesis the cause of action is the damage resulting from the defendant's act, or an omission to alter the state of things he has created, why may not a fresh action be brought? A man keeps a ferocious dog which bites his neighbour; can it be contended that when the bitten man brings his action he must assess damages for all possibility of future bites? A man stores water artificially, as in *Fletcher v. Rylands*;⁸ the water escapes and sweeps away the plaintiff's house; he rebuilds it, and the artificial reservoir continues to leak and sweeps it away again. Cannot the plaintiff recover for the second house, or must he have assessed in his first damages the possibility of any future invasion of water flowing from the same reservoir?" Lord Blackburn dissented from that view, but all the Lords who took part in the decision expressly affirmed the general principle that all the damage resulting from the same cause of action must and can be claimed in only one suit. Lord Halsbury thus said: "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage

⁷ 11 App. Cas. 127.

⁸ 3 H. L. 330.

is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time, the later stages of suffering are but the manifestations of the original damage done and consequent upon the injury originally sustained."

Nor is the decision even of the majority of the court in *Brunsdon v. Humphrey*⁹ against the general rule, and, in fact, Bowen, L.J., in his judgment in the case, expressly admitted that "nobody can doubt that if the plaintiff had recovered any damages for injury to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently."

On a similar principle, if the tort is a nuisance, not of a necessarily permanent and injurious character, the continuance of the nuisance will be a separate cause of action, and the damages resulting from it may be claimed in a subsequent suit. The case of nuisances was distinguished from that of other torts in *Clegg v. Dearden*¹⁰ on the ground, that while a trespasser is under no obligation to rebuild or replace what he has torn down or destroyed, he who creates a nuisance is under a continuing obligation to abate it; and in such a case it is only for the damage caused before the institution of a suit, that compensation could be claimed in that suit. Mr. Freeman says: "If that damage exposes the plaintiff to the expenditure of money, he may recover the full amount which he is liable to expend, whether it has been already paid out or not. The material inquiry in the second action is, whether the damages on which it is based are attributable to the original act, or to the continuing of the state of facts produced by that act. In the latter case a new cause has arisen, and a new action will lie."¹¹ The distinction as to the character of the nuisance has been often well explained. Mr. Wells says: "The difference between this (continuing injury) and subsequent breaches consists mainly in this that the latter involves separate, voluntarily acts; the former not—the former is negative, therefore a mere omission; the latter positive, made up of commission."¹² Thus *The New Hampshire Supreme Court in Troy v. Cheshire R. R.*¹³ said:

⁹ 14 Q. B. D. 141.
¹⁰ 12 App. & Ecc. N. S. 576
 Fr. Jour. 427.

¹¹ Wells, Re-s. Jour.
¹² 55 Am. Dec. 1

“Wherever the nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause except human labour, there the damage is an original damage and may be at once fully compensated, since the injured person has no means in his power to compel the individual doing the wrong to apply the labour necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not necessarily injurious, and where it is not necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury, to be compensated in a suit, is only the damage that has happened.” Similarly in *Fowle v. New Haven*¹⁴ the Massachusetts Supreme Court said: “The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff’s land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the suit. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause.” So a suit for damages for the deterioration in plaintiff’s premises by the erection and maintenance of gas works, in the vicinity, is a bar to any further suit for the same cause.¹⁵ On the same principle, the individual who so manages the water he uses for his mills as to wash away the soil of his neighbour is liable at once for all the injury occasioned by its removal, because it is in its nature a permanent injury; but if his works are so constructed that upon the recurrence of a similar freshet the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen; because it is yet contingent whether any such damage will ever arise. If a person erects a dam upon his own land, which throws back the water upon his neighbour’s land, he will be answerable for all damage which he has caused before the date of the writ, and, ordinarily, for no more, because it is as yet contingent and uncertain whether any further damage will be occasioned or not, because such a dam is not, of its own nature and necessarily, injurious to the lands above, since that

¹⁴ 107 Mass. 352.¹⁵ Decatur Gas Light Co. v. Howell 93 Ill. 19.

depends more upon the manner in which the dam is used, than upon its form. But if such a dam is in its nature of a permanent character, and from its nature must continue permanently to affect the value of the land flowed, then the entire injury is at once occasioned by the wrongful act, and may be at once recovered in damages.¹⁶ Thus where, in building a canal, a river is dammed as a feeder to the canal, and the lands of an adjacent owner are permanently flooded, he cannot recover each year the damage occasioned by the non-use of the land for that year, but must at one time recover the damages, to wit, the full value of the land. But when a dam is built, or a canal dug, or a structure erected which may or may not do damage of a particular character, then each recurring damage constitutes a new cause of action justifying a new recovery.¹⁷ In *Chicago B. and Q. R. Co. v. Schaffer*,¹⁸ a former suit for damages to plaintiff's land by overflows of a stream, caused by the defendant's railroad bridge, which was improperly and negligently constructed and maintained, was held not to bar a subsequent suit for other injuries to the land sustained subsequent to the former suit by a continuance of such bridge.

248. A suit for possession of land (of which plaintiff profits will has been dispossessed) and for mesne bar subsequent suit profits by way of damages for ten years for those accrued prior was held in *Rookmince Kooer v. Ram Tohul*¹⁹ to bar a suit for mesne profits for a prior year. The decision proceeded on the ground that mesne profits though usually measured by the actual rents and profits of the land issuing during the period of dispossession were eventually damages recoverable on account of the defendant's wrongful conduct in dispossessing plaintiff and keeping him out of possession, that the cause of action in the subsequent suit was the same as in the first, and that a claim for mesne profits could not itself be divided.

In *Venkoba v. Subbanna*²⁰ even a suit only for possession of land was held to bar a suit for the mesne profits of that land. In this case, Muttusami Ayyar and Brandt, JJ., referred to the alteration in the phraseology of Sec 43, and on the ground of it, expressed it as their "opinion, that the words

¹⁶ *Troy v. Cheslere Ry. Co.*, 55 Am. Dec. 177.
St. Louis v. Biggs, 20 Am. St. Rep. 174.
Chicago Ry. Co. v. McAuley 121 Ill. 160.
Stadler v. Grieben, 61 Wis. 500.
Miller v. Keokuk, 63 Iowa, 680.
¹⁷ *Colrick v. Swinbourne*, 105 N. Y. 593.

Harbach v. Des Moines, 80 Iowa, 593.
Athens Mfg. Co. v. Rucker, 80 Ga. 291.
Werges v. St. Louis Ry., 35 La. Ann. 641.
 124 Ill. 112.
 XXI W. R. 223.
 1. L. R. XI Mad. 151.

‘every suit shall include the whole of the claim in respect of the cause of action,’ include not only the claim arising out of that cause of action, but also any other claim founded on the same cause of action and enforceable at the date of the former suit.” No reference was made, however, in the argument or the judgment to the inference drawn against the identity of the cause of action in such cases from Sec. 44 (corresponding to Sec. 10 of the Code of 1859), which provides that “no cause of action shall, unless with the leave of the court be joined with a suit for the recovery of immovable property except a claim in respect of mesne profits or arrears of rent in respect of the property claimed.” The learned judges observed, however, that their view was in accordance with the decision of the Judicial Committee in *Madan Mohan Lal v. Sheo Sanker Sahai*.²¹ In that case, however, their Lordships only intimated that the judgment of the High Court²² was correct; and the facts of that case, which arose out of a breach of contract, were quite different, as there had been a prior suit not only for possession of the property leased, but also for mesne profits as damages for one year and the suit for subsequent years’ mesne profits was held barred not by the suit for possession but by that for mesne profits.

A Full Bench of the Calcutta High Court had held, however, in *Pratap Chandra v. Swarnamayi*²³ that a suit for possession of land and mesne profits to the date of the suit would not bar a subsequent suit for mesne profits from the date of the decree, the decision being based on the ground of Sec. 10 of the Civil Procedure Code of 1859 as well as on the fact that the cause of action for the mesne profits claimed in the second suit had not arisen at the time of the institution of the first. In *Imdad Ali v. Boonyad Ali*,²⁴ a Division Bench of the Calcutta High Court held that on account of the said Sec. 10, a suit for possession of a property would not bar a suit for its mesne profits that accrued due prior to the decree. Conversely, on similar ground, it was held in *Monohur Lal v. Gouri Sunkur*²⁵ that a suit for mesne profits of a property would not bar a suit for its possession; Mitter, J., in delivering the judgment of the court pointing out that “the difference as to the priority of the suit for mesne profits was immaterial so far as the question of construction of Secs.

²¹ 1. L. R. XII Cal. 482.

²² *Sheo Shunkur Sahoy v. Hareloy Narain*, 1. L. R. 143.

²³ 1 V. B. L. R. 113.

²⁴ XIV W. R. 92.

²⁵ 1. L. R. IX Cal. 282.

7 to 10 is concerned.” The same has been held under the present Civil Procedure Code by the Madras High Court in *Tirupati v. Narasimha*²⁶ on the ground, that “the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of Sec. 43.” It was argued in the case, that when a tenant should hold over in opposition to the landlord, the latter would be under an obligation to eject him at once, and would not have the option of suing simply for mesne profits on the ground of adverse occupancy until either the tenant gave up possession, or he desired to eject the tenant, but the High Court only observed that where the causes of action were distinct and independent, the plaintiff could not be bound to unite all the claims founded upon them in one suit.

249. In suits for property on the ground of title, it is not the title, but the infringement of it, that constitutes the cause of action; and that must determine the applicability of the rule of bar by suit. This was held directly by the Calcutta High Court in *Jardine Skinner v. Shama Soondurec*,²⁷ in which Mr. Justice Mitter, in delivering the judgment of a Division Bench of the Court said, “If the lands included in the present suit have been taken possession of by the defendants on a date different from that on which the plaintiff was ejected from the lands included in the former suit, there can be no doubt whatever that the two causes of action are entirely distinct from one another. . . . If the plaintiff was dispossessed from the parcel on the same date on which the defendants took possession of the lands included in the present suit and by the same act, her cause of action in the two suits would then be identical, but not otherwise.” It was urged against this in the case that the title upon which the present suit was based was precisely the same as that involved in the former suit. But Mitter, J., said: “This circumstance can make no difference whatever. It is not a title upon which a party relies, but the infringement of it which constitutes his cause of action; and it does not, therefore, follow that two suits are necessarily brought upon the same cause of action, merely because the title relied upon in both the cases is one and the same. Thus, for instance, a man’s right to enjoy a piece of land may depend upon one

²⁶ I. L. R. XI Mad. 210.

| ²⁷ XIII W. R. 196.

and the same title; but if he is ejected from different parts of it by distinct acts of ouster, each act of ouster would constitute a distinct and separate cause of action. Were it otherwise, it might be argued upon precisely similar grounds that he is entitled to one period of limitation only, commencing from the date of the first act of dispossession. A man may be dispossessed from one room in a house on a particular day, and he may be also dispossessed from another room in that very house twelve years afterwards. But if the two acts of dispossession are to be considered as constituting one cause of action, merely because his title to both the rooms is one and the same, the action for the second room would be barred by limitation, before there could be any necessity for its institution."

It has also been held, that the fact that a defendant's title rests upon different and distinct transactions, supported by distinct and separate evidence, does not necessarily imply that to a party contesting that title, there are different causes of action warranting separate suits; and the existence of a separate cause of action will depend on there being a distinct and separate act of dispossession.²⁸ The principle of these rulings was followed in *Riayatullah Khan v. Nasir-Khan*,²⁹ in which Straight, O.C.J., observed that "although the respondent's title to both houses rested on the title acquired by him under one and the same sale-deed, yet the cause of action, viz., his ouster from the two houses on different occasions, gave rise to two separate causes of action."

In *Pittapur Raja v. Suriya Rau*,³⁰ certain immovable properties and half of all the movable properties had been left by a will to the parties, and the defendant got the immovable property left for the plaintiff entered in the records in his name; and a suit by the plaintiff to set aside that entry and to obtain possession of the said property was held not to bar a suit by the plaintiff for his share of the movable property, as "the claim in respect of the personalty was not a claim arising out of the cause of action, which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of (the immovable property claimed in the first suit.)" In an early case,³¹ however, the Calcutta High Court held that in the case of a unity of title to different proper-

²⁸ *Ram Soondur v. Delaney*, XX W. R. 103.
²⁹ L. L. R. VI All. 616.

³⁰ L. R. XII I. A. 116.

³¹ *Jumoon Das v. Banisunderree*, II W. R. 148.

ties from which the owner was dispossessed on different dates, all the acts of dispossession prior to the former suit, would be considered as constituting one cause of action. In that case, the plaintiff claiming to be entitled to two estates in different districts as her deceased husband's, under his father's will, sued for one of the estates, and the suit was held to bar a subsequent suit for the other estate, on the ground that there was but one cause of action, *viz.*, the denial of the plaintiff's title under the will of her husband's father. It was contended that the plaintiff alleged having been dispossessed from the estates on different dates, but the High Court said that that did not affect the case. "All the acts of ouster complained of were prior to the institution of the first suit, and should have been comprised in it, as their being legal or illegal depended solely on the question of inheritance, and the validity of the will relied on by the plaintiff; and the separate acts of ouster, so long as they were committed by the same persons and as part of the same contest, would not form distinct causes of action."

Where the title is entirely different, it will indicate a distinct act of infringement, giving a separate cause of action. Thus as the relative rights and duties of owner and trespasser on the one hand and of mortgagor and mortgagee on the other are wholly different, a failure in a suit of simple ejectment does not bar a subsequent suit by the same person to enforce his right to redeem as mortgagor.⁵² Nor will a suit for the possession of a mortgaged land, brought on the ground that it was likely that the mortgage-debt had been paid off, will, on the mortgage not being proved, bar a suit for the same property by way of ejectment; because in the former suit, the obligation to restore the land on the payment of the mortgage-debt constitutes the cause of action, and the question of title does not arise even incidentally, while in the subsequent suit the plaintiff's right of action is based on the plaintiff's title.⁵³

250. In certain cases, a suit is based on one's title only, and such a suit must embrace all the property to which the plaintiff has a claim on account of that title. As an important illustration of this principle, reference may be made to suits

Suit for a share of certain joint property will bar a suit for other items of that property.

Vinayak v. Narayan, XI B. H. C. R. 224.
Amant Bibi v. Imdad Husain, L. R. XV I. A.

52 Naro Balvant v. Ramchandra, I. L. R. XIII Bom.

brought by co-parceners or co-partners for their share in the joint property. Thus a suit for the partition only of debts due to the family will bar a subsequent suit for the plaintiff's share of the family lands, the plaintiff having been, in such a case, bound to claim in the former suit a partition of the whole property which was then undivided.³⁴

On the same principle, in *Ganes Chandra v. Ram Kumar*,³⁵ a suit for certain monies said to have been misappropriated by the defendant during the time he was acting as the manager of a joint family was held to bar a subsequent suit for the plaintiff's share of certain joint paddy held by the defendant at the time of the first suit. In explaining the grounds of this decision, Mitter, J., said "that the causes of action in both the cases originated in the refusal of the defendant to give to the plaintiffs their share of the properties realized by him as manager of the joint family. . . . The manager of a joint Hindu family holds possession of various items of property, both real and personal, on behalf of the family,—Can it be contended for a moment that each member of the family has a separate cause of action for his share in each item of those properties? If such were the case, the manager would be harassed by as many different suits as there were different items of property under his management during the time the family remained joint."

A suit for a general partition will, however, not bar a suit for a particular property which ought to have been included in the former suit and was not included as being held in mortgage by a third person. This was held in *Narayan v. Pandurang*³⁶ in which Kemball, J., in delivering the judgment of the High Court, said: "The true question for consideration in cases of this kind appears to be whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second suit, and in order to apply that test to the present case, it is necessary to bear in mind the two-fold application of the word 'partition.' There may be a division of right in joint property, and there may be a division of the property itself, *i.e.*, by metes and bounds. . . . The plaintiff in his former suit could not have recovered precisely that which he now seeks to recover,

³⁴ *Uklu v. Daga*, I. L. R. VII Bom. 182.

³⁵ III B. L. R. A. C.

| ³⁶ XII B. H. T. R. 148.

for the reason that, in that suit, he sought a division of property, whereas this particular *Thikan*, being then in the possession of a mortgagee, was not available for an actual partition. It has been pressed upon us that the plaintiff might have asked for a 'division of right' in respect of this property in the former suit, but that is not the question. He sought for a division of property as against P., and, in respect of this property, he had then no such cause of action against him. Sec. 7 of the Civil Procedure Code did not render it obligatory upon the plaintiff either to include this division of right in his suit for division of property or to abandon for the future all hope of establishing it by an action." The Madras High Court has also held that in a suit by a Karnawan against Anandrawans for property in their possession, the cause of action is the right of the Karnawan to demand the restoration of any of such properties at any time, he not being entitled to demand them at once or in one suit.³⁷

251. In suits to set aside alienations, each alienation constitutes a separate course of action.³⁸

Identity of cause of action in suits for setting aside alienations.

In *Rao Kurun Singh v. Mahomed Fyz Ali Khan*,³⁹ a Hindu widow first made a mortgage of her deceased husband's property to a certain person, and after that made a gift of it to him, and a suit in the widow's lifetime for possession by setting aside the gift was held not to bar a suit after her death for having the mortgage declared to be not binding against the plaintiff, the two suits being based on different causes of action; and the first suit having been really only for a declaration of the invalidity of the gift as against the plaintiff, because in the widow's lifetime a suit for possession could not lie. In the same way each mortgage was, in *Moro Raghunath v. Balaji Trimbak*,⁴⁰ held to constitute a separate cause of action, though it is to be observed that in that case the second mortgage on which the first suit was based comprised only some of the lands mortgaged by only one of the persons who had made the first mortgage.

The decision in *Shafkat-un-nissa v. Shib Sahai*⁴¹ is not against this view. In that case J, having a right to certain

³⁷ *Kannan v. Tenju*, I. L. R. V Mad. 1.

³⁸ *Jehan, v. Saivak*, 1 Agra. F. B. 109.

³⁹ XIV M. L. A. 187.

⁴⁰ I. L. R. XIII Bom. 45.

⁴¹ I. L. R. IV All. 171.

shares in her father's estate as his and her brother's heir, alienated her rights by two deeds executed on different dates; and a suit by the alienee for the shares comprised in one deed against the persons who had purchased all the estate in execution of decrees against the other heirs of the father and brother, was held to bar a subsequent suit for the shares conveyed by the other deed. The decision proceeded, however, on a different ground, Tyrrell, J., in delivering the judgment of the High Court, having said: "It is indisputable that the parties to both actions are substantially the same, the alienees of Sahib-ud-din's heirs being in fact ShibSahai alone in his own and his brother's names, and it must be admitted that as regards this alienee the plaintiff's common cause of action in both suits arose from the circumstance that the possession of a part of her inheritance was wrongfully withheld. It cannot affect the principle embodied in the rule of Sec. 43 that the plaintiff's title in respect of the whole inheritance happened to have a double root. This circumstance would not alter the wholeness of her claim as against the alienee of the false heirs arising out of her one cause of action against him, which was nothing but his possession on a bad title to her wrong. It is possible that, if the portions of the inheritance coming to the plaintiff through her father and brother respectively had been defined and ascertained, and if the first transfer had purported to alienate the one portion so ascertained and specified, the other similarly purporting to affect the other known share, the court might see its way to a decision not adverse to the present suit. Under such circumstances it might have been held that each alienation constituted a distinct cause of action, and that it was therefore not obligatory upon the plaintiff to make each separate purchaser a party to her first suit upon pain of forfeiting all future right of suit against them by reason of such omission."

252. As to suits on contracts also, it may be laid down as a general principle that the breach of each contract constitutes a separate and indivisible cause of action. The mode of entering into the contract, the nature of its consideration, as well as the manner and the time in

Breach of each of several contracts arising from same or similar facts constitutes a distinct cause of action.

which the consideration is given or performed, are immaterial for the cause of action, except so far as they may tend to indicate whether there is only one contract and therefore one breach. The circumstance of a contract being conditional does not prevent it from being regarded as indivisible. Thus, where the contract was to sell a certain quantity of hay if the promisor had so much to spare, a suit for a part of the hay was held to bar a subsequent suit for the rest of it.⁴²

Even contracts growing out of the same transaction or out of a state of facts apparently homogeneous, are considered distinct and as giving rise to distinct causes of action. In *Umed Dholchand v. Pir Saheb*,⁴³ the defendant had given two bonds on the same day in respect of the principal and the interest, respectively, due on a previous bond, and Sir Charles Sargent, in delivering the judgment of the Court said, "There can be no doubt that the two bonds and the default in payment of them constitute, in any view of the expression 'cause of action,' two distinct causes of action, and there is nothing, we think, in the language of the section (43) which would justify the court in going behind the bonds to consider the circumstances out of which they sprung, albeit these circumstances might themselves at the time have constituted a cause of action." In *Nanu v. Raman*,⁴⁴ the Karnawan and the Anandrawans of a tarwad made a usufructuary mortgage of certain lands of the tarwad, of which actual possession could not be given as it was under mortgage to a third party. Some of the mortgagors therefore executed a *pattamchit* on the date of the mortgage, agreeing to rent the lands from the mortgagee; and a suit for rent on the *pattamchit* was held not to bar a suit for the principal and interest due on the mortgage; it being observed by the court that the obligation sought to be enforced in the two suits was not the same.

Similarly, where a railway passenger having a bag containing apparel and a trunk containing merchandise, of which he gave intimation on applying for tickets, had paid extra for the carriage of the latter, a suit for the loss of the former against the Railway Company was held not to bar a

⁴² Robinson v. Crowninshield, 1 N. H. 77.
⁴³ 1. L. R. VII Bom.

| ⁴⁴ 1. L. R. XVI Mad. 335.

suit for a loss of the latter.⁴⁵ On a similar principle, it has sometimes been held that each charge on a property is a distinct cause of action, not to be affected by proceedings for the recovery of other charges, antecedent or subsequent.⁴⁶

253. When different contracts are so made as to form

Breach of several contracts made as a part of same transaction or in pursuance of one general contract constitutes only one cause of action.

“part of the same transaction or as if it were in pursuance of one general contract; a breach of all the said contract is treated as that of the general contract, and held to constitute only one cause of action. Thus, if general articles of merchandize be sold at one

time, the transaction will constitute but one demand.⁴⁷ So also an account for a bill of goods purchased on one day is to be taken as one entire transaction in the absence of a contrary intention between the parties. Even an account for goods sold and delivered, consisting of several distinct items, delivered at different times, but all due, is an entire demand within the meaning of the rule, so that a recovery for a part of it, will be a bar to a suit for the residue.⁴⁸

The creditor cannot split it into several demands and actions, when the dealing was continuous, and nothing appears on the face of it, or in the account rendered, to indicate that either party intended that each item should constitute a separate transaction.⁴⁹ In fact, in actions for goods sold, for money loaned and received, at various times, the whole amount due at the commencement of the suit is generally held to constitute but one demand, on the ground that, in such a case, it is reasonable for the courts to presume that there was an agreement in pursuance of which the plaintiff, for a definite period of time, or at the will of both parties, was to furnish goods, to loan money, or to perform labor; and that the amount due under the agreement should constitute but one cause of action.⁵⁰ Mr. Freeman says: “What is an account or a dealing upon an account is difficult to state, and is probably a question of fact to be determined from all the circumstances. Doubt-

⁴⁵ *Millard v. Railroad Co.*, 20 Han. 191.

⁴⁶ *McIntosh v. Lowry*, 49 Barb. 550.

⁴⁷ *Smith v. Jones*, 15 Johns. 229.

⁴⁸ *Dulaney v. Payne*, 40 Am. Rep. 205.

⁴⁹ *McC. v. Cocks*, 32 Am. Dec.

⁵⁰ *McC. v. Barnes*, 17 Conn. 420.

⁴⁹ *Magruder v. Randolph*, 77 N. C.

⁵⁰ *Pimney v. Barnes*, 17 Conn. 420.

less where the parties are merchant and customer, or are regularly doing business with each other, under circumstances calling for the keeping of accounts, the debtor has a right to have his entire indebtedness treated as one and indivisible. And generally, where a creditor seeks to recover two or more judgments for items of indebtedness due to him when the first suit was brought, he must show some reason why such indebtedness should be treated as divisible. The question is one of agreement or understanding, express or implied, to be determined by the ordinary modes of business,⁵¹ or by the direct agreement of the parties. Thus where one person is furnishing articles to another, and they agree that bills are to be made out and due and payable at the end of each month, this has been held to give rise to a separate cause of action at the end of each month, and to warrant two separate actions and recoveries for the amounts due at the end of two months, though both were due before either action was brought.⁵² Where an indebtedness is contracted with a merchant, most of the articles furnished being purchased by the husband, and the account running for several years comprises even some such items as the statutory estate of the wife is liable for, and the account is kept as one continuous running account on the books of the merchant, such account constitutes but one debt, for the whole of which the husband is liable; and but one suit can be maintained against him for its recovery.⁵³ Where goods are sold, or money received, under such circumstances, that the different items are but one transaction, the cause of action will be entire, and a recovery for any part will be conclusive against the right to sue for the balance.⁵⁴ The correctness of this rule was admitted even in *Secor v. Sturgis*,⁵⁵ in which the particular circumstances of the case were held to warrant a presumption to the contrary. The New York Supreme Court said in that case: "Where there is an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist

⁵¹ *Borngesser v. Harrison*, 78 Am. Dec. 757.

Buck v. Wilson, 113 Pa. St. 423.

⁵² *Beck v. Devereaux*, 9 Neb. 109.

⁵³ *Fr. Jud.* 418.

v. Tannenbaum, 62 Ala. 5.

⁵⁴ *Guernsey v. Carver*, 24 Am. Dec. 60.

Stevens v. Lockwood, 29 Am. Dec. 1.

Colvin v. Corwin, 15 Wend. 557.

Bunnell v. Pinto, 2 Conn. 431.

⁵⁵ 16 N. Y. 548.

will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and, usually, in the case of a running account, it may fairly be implied that it is in pursuance of an agreement that an account may be opened and continued either for a definite period, or at the pleasure of one or both of the parties. But there must either be an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, indivisible. Applying this test to the present case, it is very clear that the two accounts did not constitute an entire claim; but, on the contrary, that they were several and formed two several causes of action. The business of the plaintiff consisted of two branches, which were designed to be and were kept entirely distinct, in each of which one of the accounts was made, and an arrangement was entered into, under which one of the accounts arose anterior to the opening of the other account. Here was no express contract connecting the two accounts, and the facts, instead of warranting the presumption of such a contract, show that separate agreements only, one in regard to each account, were intended."

This rule was dissented from in *Badger v. Titcomb*,⁵⁷ in which Wilde. J., in delivering the judgment of the Massachusetts Supreme Court, referred to *Guernsey v. Carver*, and said: "We know of no principle of law nor of any other decided case, on which the decision in that case can be sustained. It is said that the law abhors a multiplicity of suits, and this seems to be the only ground of the decision in that case. But that reason would apply to notes and other demands unquestionably several and independent. As the law is, we think it cannot be maintained that a running account for goods sold and delivered, money loaned, or money had and received at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing from which such an agreement or understanding may be inferred." This decision was criticised and refuted, that in *Guernsey v. Carver* being followed by the New York

Supreme Court in *Bendernagle v. Cocks*,⁵⁸ and that is also the rule adopted generally by the courts.⁵⁹ Under the corresponding English enactments, forbidding the splitting of claims, as observed by Wilson, J., in *Anderson v. Kalagarla*,⁶⁰ it has several times been held that a cause of action is not limited to claims arising upon one contract, but may include claims upon several contracts, provided they form a part of a continuous course of dealing, as in the case of goods supplied from time to time by a tradesman to a customer, though not otherwise.⁶¹ Sir Richard Garth in that same case pointed out the inconvenience referred to by Chief Baron Pollock in *Grimbly v. Aykroyd* of construing the term 'cause of action' to mean '*cause of action on one separate contract*,' and on the other hand of construing it so as to include 'all contracts executed' which could be sued for in one *indebitatus* count; and further observed that it was only several debts of the same nature that had been held to form part of the same cause of action, and in case of a tradesman's bill where the items in the bill, though accrued at different times, had been treated by the parties as one entire claim; "but where the several debts included in the account are not of the same nature, as for instance, where one item of an account is for the price of a horse and another is for rent, and another for goods sold, it has been held that several suits" might lie;⁶² and that the same was held in *Brunskill v. Powell*⁶³ in which separate suits were held to lie successively for the value of liquors and for cash supplied by a publican and included in one bill. The learned Chief Justice added that the real principle, which runs through all cases is that, if the several items which make up the claim are of the same nature and form part of the same course of dealing, so as to pass under the same description and form part of one transaction, they must be considered as one cause of action and must be joined in one suit, though they may have arisen out of several contracts. But claims which are diverse in character, which do not answer the same description, and which would require a different class of evidence to support them, may

⁵⁸ 32 Am. Dec. 448.

⁵⁹ Bl. Jud. 880.

⁶⁰ 1 L. R. XII Cal. 330.

⁶¹ *Grimbly v. Aykroyd*, 1 Excl. Wood v. Perry, 3 Exch. 442.

v. Wordsworth, 25 L. J. N. S. C. P.

v. Ellis, 1 D. & L. 163.

on *v. Willey*, 1 L. M. & P. 280.

⁶³ 1 L. M. & P. 550.

be made the subject of different suits though they may arise out of the same contract."

On the same principle, the amounts due upon a book-account, though considerable in number, are generally regarded as constituting one debt and one indivisible demand.⁶⁴ Where of the amount due on a book-account, some of the items were covered by the defendant's promissory notes, not received as payment but merely in the plaintiff's hands, a suit for the said items was held barred by a suit for the remaining items.⁶⁵ A suit on a book-account will not bar a suit for an account accruing subsequent to the first suit,⁶⁶ nor a suit for articles delivered before the first suit, but not included in that suit on the ground that the time of payment had not arrived.⁶⁷

254. The same principle has been held to apply to wages due for work and labor performed at different periods, and if the work is done or the labour performed under a general hiring or retainer, they form but one demand, and cannot be severed by withdrawing the amount due for a particular month or week formally from the record in one suit, and making it the basis of another. Nor is the cause of action less entire, because the services were not continuous; so, when a man paid by the day or week returns to his employer after a short absence, he will not be presumed to recommence his work under a new contract, nor entitled to bring separate suits for that which, although performed at different periods, is, in the eye of the law, only one consideration. Where a person is employed for a year, at a stipulated sum per month, but is discharged before the expiration of his term, a suit for the amount due up to the time of such discharge, will not bar a suit subsequently brought to recover the balance due to him for the remaining portion of the year. So also a suit in such circumstances, for damages for a wrongful dismissal, will not be a bar to a subsequent suit to recover wages earned during the time the plaintiff was actually employed, and due and payable before the wrongful dismissal; for, the two claims constituted sep-

Bendernagle v. Cocks, 32 Am. Dec.
Oliver v. Holt, 46 Am. Dec. 225.
Lucas v. LeCompte, 42 Ill. 303.
Magruder v. Randolph, 77 N. C. 79.
Pittman v. Christman, 59 Miss. 126.
Colburn v. Woodworth, 21 Barb. 381.

v. Zane, 24 Pa. St. 242.
Guernsey v. Carver, 24 Am.
⁶⁵ *Buck v. Wilson*, 113 Pa. St. 423.
⁶⁶ *Avery v. Fitch*, 4 Conn. 362.
v. Hill, 6 Vt. 20.
ie v. Cocks, 32 Am. Dec. 445.

rate and independent causes of action, upon which separate actions are maintainable.⁶⁸

In *Sowsin v. Salorgue*,⁶⁹ the Court said, however, "A servant unlawfully discharged may treat the contract as rescinded and sue on *quantum meruit* for services actually rendered, or he may bring his action for damages for breach of contract. He may wait to do this until the term is ended, and recover his actual damages, or he may sue at once and recover his probable damages from the breach. But when he has elected his remedy and pursued it, a judgment in one action will be a bar to a further suit If the discharged servant brings his action before the measure of damages has been filled, or before the damages have been all known, it is his folly, or his misfortune. He cannot sever them, and recover part in one action and the residue, when discovered in another." In *Logan v. Caffrey*,⁷⁰ the plaintiff had agreed to serve the defendant as a farm hand at the rate of one dollar a day; and the Pennsylvania Supreme Court said: "Can a hireling, then, after periods of service under such a contract, bring separate suits for each day he wrought? As well might the shopman bring separate suits for the tea, coffee and sugar sold to his customer, or for the packages delivered each day that the account was running. Such multiplicity of actions would not be tolerated."

255. When there are in any contract more than one of each of several in one contract constitutes a distinct cause of action when they are essentially distinct. covenant, the breach of them all constitutes one cause of action, unless from their nature the covenants are so different from each other as to be considered separate contracts; in which case, the breach of each covenant will be a separate

cause of action. Thus, where a lease contained seven distinct and independent covenants, the third of which was to keep the buildings and fences in repair, and the seventh to build 125 rods of fence during the term, it was held that a suit by the lessor, upon the last covenant, for not building the fence, would not bar an action subsequently brought upon the covenant to repair, the two covenants being distinct and having no connection with each other, except that they were contained in and evidenced by the same instrument.⁷¹

⁶⁸ *Perry v. Dickerson*, 39 Am. Rep. 662.
⁶⁹ 14 Mo. App. 486.

⁷⁰ 30 Pa. St. 201.
⁷¹ *McIntosh v. Lowm*, 49 Barb. 560.

A suit for rent by a lessor has, however, been held to bar a subsequent suit to enforce the forfeiture of the lease for the non-payment of that same rent.⁷² So also where a mortgage-deed provides for the delivery of the possession of the mortgaged property to the mortgagee and for the credit by him of the net profits towards the payment of the annual interest, and for the payment of the deficiency, if any, by the mortgagor, and for the redemption after four years by him on payment of all the principal and interest due at that time, a suit for interest after some time on the ground of the non-delivery of possession will bar a subsequent suit brought by the mortgagee after the expiry of the four years for the principal and the interest accrued subsequently to the first suit. This was held directly in *Hikmatulla v. Inam Ali*,⁷³ on the ground that there was no continuing breach where the mortgagor failed to give possession of the mortgaged property to his mortgagee under a usufructuary mortgage, and Mr. Justice Straight said that, "the plaintiffs' cause of action to recover their principal sum of Rs. 300 accrued to them upon the date when possession of the mortgaged property was first refused to them, and this was the same cause of action which entitled them to claim interest in the month of April 1882, and that when they brought their suit to recover the unpaid interest, which unpaid interest could be only due to them upon the view that the contract to give possession had been broken, they were bound to sue for the principal amount and were not entitled to wait until the four years had expired." So, also, a suit to redeem on the ground of the mortgagee having received more than the amount due in respect of the mortgage will bar a subsequent suit for the amount of the surplus received. This was held in *Baloji Tamaji v. Tamangoud*,⁷⁴ in which Sir Richard Couch said: "That the claim which arose out of the cause of action when the suit for redemption was filed was, that the plaintiff, the mortgagor, was entitled, first, to recover possession of the mortgaged property on the ground that the mortgage had been satisfied out of the rents and profits received by the mortgagees, and, secondly, to get back any sum over-paid; and that, therefore, the first suit should have claimed both possession and the surplus." A suit by the purchaser of a certain share of the mortgagor's

⁷² *v. Krishna*, I. L. R. VI Mad. 169.

⁷³ I. L. R. XII All. 293.

⁷⁴ VI E. H. C. R. 90.

equity of redemption for the possession of that share, will bar a suit by him, as such, for the remaining share of the property, but will not bar a subsequent suit he may bring for the remaining share on his purchase of it during the pendency of the former suit.⁷⁵

So, also, in a contract for the sale of certain goods, some of which the purchaser refuses to take, and some of which he has taken he refuses to pay for, the covenants to take all the goods and pay for them are not really distinct, but only one contract, and the breach thereof as one indivisible cause of action. In *Anderson v. Kalagarla*,⁷⁶ Sir Richard Garth expressed a contrary opinion, and said: "That in actions founded on contract the most diverse causes of action might, under the English system of pleading, have formed the subject of one and the same special count; but it was never suggested on that account, that these diverse claims could be considered in any sense the same cause of action. Thus, in an action upon a lease, claims might have been made in the same count: 1st, for rent; 2nd, for not repairing the demised premises; 3rd, for not paying rates and taxes; 4th, for not insuring the premises from fire; and 5th, for improperly cutting down trees. But no one ever heard, so far as I am aware, of any two of these claims being considered as one cause of action. I have looked through all the reported cases that I could find, and all the English as well as Indian Digests, for any authority that a *claim for debt and a claim for damages*, though arising out of the same contract, has ever been considered as the same cause of action, but I have found none; and I believe that this is the first occasion when such a proposition has ever been suggested." Mr. Justice Wilson, however, differed from him and said, "Where there are two breaches of one term in one contract, and both occur before any suit is brought, the cause of action within the meaning of Sec. 43 is the non-performance of the promise, and only one suit will lie. In this case I think the cause of action is that the defendant contracted to take and pay for ten bales of yarn and failed to do so." This last view has been adopted by a Full Bench of Calcutta High Court in *Duncan Brothers v. Jeetmull*,⁷⁷ in which Sir William Comer Petheram cited the above observation of Wilson, J., with approval, and after referring to the judgments of their Lordships of the Privy Council in *Buzloor Ruheem v. Shumsoonnissa*

⁷⁵ *Brahmanayaki v. Krishna*, I. L. R. IX Mad. 92. | ⁷⁶ I. L. R. XII Cal. 339. | ⁷⁷ I. L. R. XIX Cal. 372.

Begum,⁷⁸ in *Shankar Baksh v. Daya Shankar*,⁷⁹ and in *Soorjomonee Dayee v. Suddanund*,⁸⁰ said, "To apply the test laid down by their Lordships of the Privy Council, each of the two cases before us is founded, in fact, on a cause of action distinct from that which is the foundation of the other. The two suits were brought simultaneously, and they are, no doubt, different in the form of action, but still the claim in both is for damages on account of breaches of the same contract. The difference in the form of action is of no consequence, for it has been laid down by their Lordships of the Privy Council that the substance rather than the form of action should be taken into consideration. In both the plaintiff seeks to recover monies due from the defendant on breach of the same contract,—in the one suit as the price of goods delivered, in the other as damages in consequence of non-acceptance of other goods. In substance, the two suits are the same. In both the plaintiff seeks to obtain the benefit of his contract. Taking this with the illustration to Sec. 43, I think that the plaintiff was debarred from bringing two suits."

256. But when a contract comprises several covenants to be performed at different times, the breach of each will, as it occurs, constitute a separate cause of action. The courts have thus often held that each successive breach of a contract constitutes a separate cause of action, so that a plaintiff, after recovering for one breach on the contract, will not be barred from recovering on a subsequent breach. Thus, in *Badger v. Titcomb*,⁸¹ Wilde, J., said: "It is undoubtedly true that only one action can be maintained for the breach of an entire contract, unless by the terms of it, it is in its nature divisible. But if one contracts to do several things at several times, an action of *assumpsit* lies upon every default. . . . The principle is well established that a contract to do several things at several times is divisible in its nature, and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract." In *Stifel v Lynch*,⁸² ice was sold at so much per ton, to be paid for in cash on the delivery of each load, and a suit for the price of the ice

⁷⁸ XI M. L. A. 501.
⁷⁹ L. R. XVI L. A. 66.
⁸⁰ XII B. L. R. 501.

⁸¹ 26 Am. Dec.
⁸² 7 Mo. App.

delivered on certain occasions was held not to bar even a suit for that of the ice delivered on some prior occasions.

The weight of authority, however, is in favor of the view, that when there has occurred, the breach of more than one covenant, the breach of all the covenants, before any time, will at that time, be deemed to constitute only one cause of action, being joined into one by the original contract, and regarded as a breach of all the covenants so far as enforceable at that time. Thus Mr. Black says⁸³—
 “Where several claims, payable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability accrues. But it has been held, that if no action is brought until more than one is due, all that are due must be included in one action.” On this principle, a suit for breach of a covenant is held to bar a suit of other breaches of the same covenant, which occurred before the first suit was instituted;⁸⁴ and a suit on a contract which entitles the plaintiff to several sums maturing at different times will be an effectual bar to a second suit brought to recover claims that were due when the first suit was brought.⁸⁵ And where there are breaches of several covenants contained in one instrument, a suit brought for damages for some of the breaches will bar a subsequent suit for damages for other breaches which had occurred before the institution of the former suit.⁸⁶ Where an action is brought on a contract, all claims arising under the same and then due, constitute an entire and indivisible cause of action: though the amounts accruing under it after the former suit may be claimed in a subsequent suit.⁸⁷ Thus, if one has hired property of, or is himself working for, another for a compensation to be paid at regular intervals, as by the week or month, whatever is due to him at any one time, though it may be made up of wages due for two or more months or years, is regarded as due upon one contract, and therefore not subject to separate actions, and a recovery for any month or year precludes any further recovery for wages due at the time of the former suit whether earned before or after those for which a recovery was had in that suit.⁸⁸

Bl. Jud. 89.

⁸⁴ *Coggins v. Bulwinkle*, 1 E. D. Smith, N. Y. 444.

⁸⁵ *Reformed P. D. Church v. Brown*, 54 Barb.

Union R. and P. Co. v. Treadwell, 50 Mo. 87.

Burritt v. Boley, 36 Am. Rep. 79.

⁸⁶ *Joyce v. Moore*, 10 Mo. 2.

⁸⁷ *O'Boone v. Lloyd*, 43 N. Y. 248.

McEvoy v. Bock, 34 N. W. R. 740.

Rosenmueller v. Lampe, 31 Am. Rep. 74.

Steen v. Prairie Rose, 93 Am. Dec. 631.

Where a promissory note which, according to its face, runs for several years, contains a proviso that the interest shall be payable annually, and "if the interest is not so paid, the entire principal sum shall immediately become due and payable," the omission to pay the interest for a given year will not operate to render the annual interest thus accrued and unpaid, together with the principal sum, an entire demand, in any such sense as will preclude a recovery for each year's interest as it shall accrue, in successive suits therefor.⁸⁹ Again, where one accepts an order to pay a given sum out of the first money of the drawer which he shall receive on account of a certain business, this binds him to pay from time to time, on reasonable request, as the money is received by him, and a judgment recovered against him for a part of the sum, upon demand therefor and refusal, does not bar a subsequent action for a further sum received by him after the commencement of the first suit.⁹⁰ If by virtue of a contract, monies become due in instalments or at regular intervals, a suit for any instalment will bar a subsequent suit for any other instalment due at the time of the institution of the former suit,⁹¹ but not that for instalments subsequently falling due.⁹² In *Lorillard v. Clyde*,⁹³ Vann, J., in delivering the judgment of the New York Supreme Court, said: "It is doubtless true, as a general proposition, that each default in the payment of money falling due upon a contract payable in instalments may be the subject of an independent action, provided it is brought before the next instalment becomes due; but each action should include every instalment due when it is commenced, unless a suit is, at the time, pending for the recovery thereof, or other special circumstances exist."⁹⁴

In British India also, where a lessor failed to give possession of the land leased by him to the lessee, a suit by the latter for mesne profits for one year was held by Calcutta High Court⁹⁵ to bar a suit by him for those for the subsequent years prior to the former suit, as the cause of action in both the suits was the non-delivery of the possession; and

⁸⁹ *Marfoot*, 103 Ill. 183.
⁹⁰ *Dulaney v. Payne*, 40 Am. Rep. 20.
⁹¹ *Sparhawk v. Wills*, 6 Gray, 161.
⁹² *Perry v. Harrington*, 37 Am. Dec.
⁹³ *Perry v. Mills*, 71 Iowa, 622.
⁹⁴ *Clark v. Jones*, 43 Am. Dec. 703.
⁹⁵ *Epstein v. Greor*, 85 Ind. 372.
⁹⁶ *Ahl v. Ahl*, 60 Md. 207.
⁹⁷ 19 Am. St. Rep. 470.

Reformed P. D. Church v. Brown, 54 Barb. 191.
⁹⁸ *Cram*, 40 Am. Dec. 37.
⁹⁹ *Sturgis*, 10 N. Y.
¹⁰⁰ *Jox. v. Jacob*, 10 Hun, 107.
¹⁰¹ *Bendernagle v. Cocks*, 32 Am. Dec. 448.
¹⁰² *Shao Shankur Sahov v. Hriday Narain, I.*
L. R. IX Cal. 143.

the decision was affirmed on appeal by their Lordships of the Privy Council.⁹⁶ Where a bond for the repayment at a certain time of certain money with interest, further stipulated that in default of payment at that time, interest would continue to be paid yearly and the principal and the interest remaining unpaid would be paid on the redemption of another mortgage, a suit for interest after the time fixed for repayment *ab initio* would not bar a subsequent suit for the interest for a period subsequent to the first suit.⁹⁷ In *Appasami v. Ramasami*,⁹⁸ the defendants on a statement of accounts found a balance of Rs. 3,500 against them, and gave an order for Rs. 2,520 on their servants to pay the same from the income received from certain villages for certain years, and promised to pay the balance in a month, and two separate suits were instituted for the recovery of the two items respectively, and at plaintiff's option the suit for the smaller amount was held barred by the other; the High Court observing that "the two claims, or rather the claim in respect of which two separate suits have been brought, in our opinion arise out of one and the same cause of action, namely, an obligation on the part of the debtors to pay and a right in favour of the creditor to sue for payment of the sum which the debtors admitted as due on settlement of accounts and which they thereon promised to pay; and the fact that the debtors undertook to pay part of such sum at once and part after expiry of a fixed time which had elapsed when these suits were brought cannot enable the creditor to split an entire demand in a manner which Sec. 43 was intended to prohibit The District Munsif is not correct in saying that a different cause of action arises on each occasion when, in respect of a debt secured by an instrument providing for payment by instalments, there is failure to pay an instalment: under the terms of the agreement there accrues due to the creditor a part of his debt in respect of which he can sue, but the cause of action out of which the claim arises is the same, and the creditor is bound to include in his suit all that is then due in respect of his claim." The Calcutta High Court held the same in *Mackintosh v. Gill*,⁹⁹ Sir Richard Couch observing that "it is incumbent on the plaintiff, when two or more instalments of such a promissory note as this are due at the

Madan Mohan v. Sheosankar, 1 L. R.

⁹⁸ 1 L. R. 1X Mad. 279.
XII B. L. R. 37

Shalapa v. Balapa, 1 L. R. VII Bom. 446.

time he brings his suit, to sue for them in one action, and he is not at liberty to sue separately for each instalment or for some of them."

Sir Richard Garth, C.J., observed in *Anderson v. Kalagarla*¹⁰⁰ that "claims under the same contract for several instalments of the same rent, or for several instalments of the same promissory note have been held over and over again (under Sec. 43) to be claims for the same cause of action. The claims in these cases are not only of the same nature but are virtually for instalments of the same debt or obligation. And the Illustration given in Sec. 43 seems to me to show that these are the sort of cases to which the section is intended to apply." The Madras High Court had also acted upon the principle in *Chokalinga Pillai v. Viruthalam*,¹ in which a lease for two years had provided for the payment of rent in kind at four different times, and the Madras High Court said: "The dealing was continuous for two years, and though plaintiff of course might have sued for each item or instalment of rent as it fell due, the aggregate of two or more of such unpaid instalments cannot be divided into two or more causes of action, but must be deemed one cause of action." Under the Code of 1859, it was held in *Sutto Churn v. Obhoy Nund*² that a separate suit would lie for the rent of each year; and that decision was followed in *Ram Soondur v. Krishno Chunder*³ and *Kristo Kinkur v. Ram Dhun*.⁴ "In one sense," said Wilson, J., in *Anderson v. Kalagarla*, "Every breach of contract is a separate cause of action. But the Illustration to Sec. 43 shews that the framers have not here used the expression in this sense." That Illustration is: "A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. A sues B only for the rent due for 1882, A shall not afterwards sue B for the rent due for 1881." Speaking of the illustration, Pontifex, J., in delivering the judgment of the court in *Taruck Chunder v. Panchu Mohini*,⁵ said: "It represents only the exact state of circumstances which existed in the case of *Raja Sutto Churn v. Obhoy Nund*, and it would have been clear if the illustration had been general and not confined to the peculiar circumstances of that case. But it was certainly intended to reverse the decision of *Sutto Churn v. Obhoy Nund*, and with it the entire foundation of the decisions in the two other cases likewise fails. In

¹ I. L. R. XII Cal. 342.
² IV M. H. C. R. 334.
³ II W. R. (Act X Bul.) 31.

⁴ XVII W. R. :
⁵ XXIV W. R. 326.
⁶ I. L. R. VI Cal.

my opinion, there can be no reason to distinguish between a suit omitting to claim an earlier rent and a suit omitting to claim a later rent which is due at the date of its institution. The illustration certainly treats a claim to all arrears of rent as a single cause of action."

257. A suit for breach of contract ought to embrace all the damages resulting from it, and a subsequent suit even for damages sustained after the former judgment from the same act of breach will be barred.⁶

Suit for breach of contract must include all prospective damages.

In *Stein v. Prairie Rose*,⁷ the owner of a barge entered into a contract of hiring with the owners of a steamer for the sum of ten dollars per day until re-delivery in like good order as received. After the barge had been retained in their service for a considerable period of time, he brought an action against them, and recovered the amount due up to the commencement thereof. On a subsequent date he brought another action to recover the amount alleged to have become due to him for the hire of the barge after the commencement of the former action, and the court held that the contract was entire for the use of the barge to be returned in a reasonable time; that if it were not so returned there might be an action for breach of contract for its return; that the right of the party was, not to exact ten dollars per day perpetually, but to charge that for a reasonable time; that his former action, in effect, averred that the reasonable time had expired; and that the whole debt was then due, and, therefore, that his former recovery merged his entire claim to recover for the use of his barge under the contract. Where there is a continuing contract, as for instance, a contract for repairs, a suit thereon will not bar a suit for damages occasioned by a breach of the contract occurring subsequently to the commencement of the prior suit, because the second claim would be in respect of a separate cause of action.⁸ But it will be, of course, different in the case of an entire contract, such as a total breach completely ends, and gives a right of action for the whole damages. Thus, in *Fish v. Folley*,⁹ the defendant covenanted, in 1882, to supply from his dam for the plaintiff's mills a continuous supply of water, and a total breach of the covenant occurring in 1826, the plaintiff in 1835 brought a suit for the damages sustained

Indiana v. Koons, 105 Ind. 507.
Smith v. Great Western Ry. Co. 6 U. C.
 O. P. 166.

⁷ 93 Am. Dec. 631.

⁸ *Beach v. Orain*, 49 Am. Dec. 369.

⁹ 6 Hill (N. Y.) 54.

by him up to that time; and that suit was held to bar another suit for damages occurring since the last named date, and the Chief Justice said: "He now claims to recover from that time to the commencement of this action, insisting that the covenant is a continuing one, and the liability to performance on the part of the covenantor and his representatives perpetual. I cannot assent to this construction. It is true the covenant stipulated for a continued supply of water to the plaintiff's mills, and in this respect it may be appropriately styled a continuing contract. Yet, like any other entire contract, a total breach put an end to it, and gave the plaintiff a right to sue for an equivalent in damages. He obtained that equivalent, or should have obtained it, in the former suit. To allow a recovery again would be splitting up an entire cause of action, in violation of established principles."

In *Priest v. Deaver*,¹⁰ Thompson, J., adverting to the difficulty of distinguishing between the cases in which there may be successive recoveries upon successive claims arising out of the same contract, and those in which a single recovery for a breach puts an end to all further liability on that contract, said: "The test question generally is, whether the subsequent suit is for a breach of the same or a different undertaking from that upon which the first suit was maintained. Thus in the case of a lease for a year, with the rent payable monthly, although the contract is a unit, yet there is a separate undertaking for the payment of each month's rent. The lessor, therefore, having recovered judgment for one month's delinquency, may yet sue and recover for the non-payment of a succeeding month's rent. *Kerr v. Simmons*¹¹ is itself an illustration of the other class of cases. The lessee had covenanted for a surrender of the premises at the end of the term, otherwise to pay double rent for every day he should hold over. He held over for one month; thereupon the lessor sued and recovered the double rent for that month. He held over another month, at the expiration of which the lessor sued again. It was held that he could not recover, because the gravamen of the action was, not the several undertaking to pay double rent for each month (which constituted only an agreed measure of damages), but the breach of the single undertaking to surrender possession; and as this breach had been the subject of one recovery, there could not be another for the same cause."

¹⁰ 22 Mo. App. 276.

¹¹ 9 Mo. App., 376.

258. A suit for possession of a piece of land which the defendant had included in her homestead by building walls, brought with the allegation that there were two palm trees on it, to which the defendant wrongfully denied access to plaintiff, was held in *Maksud Ali v. Nargis Dye*,¹² to bar a suit for the trees themselves, and the High Court said, "that the plaintiff's present claim arose, and now arises, out of the same cause of action as that in the former suit. He claims the right in the trees and, by implication at least, a right of way to them for the *pasis* to enable them to draw the juice. We think that his cause of action in respect of this arose out of the matters, the subject of the former suit. As a matter of fact the defendant did then claim the trees, both expressly and also by the building of the wall so as to bar the access to them at her pleasure; the plaintiff applied for that reason to have the right to the trees determined in that suit, but this was refused, as he had not asked for relief in respect to them in the suit. . . . Part of the cause of action which he then had was the interference by the defendant both with the plaintiff's possession of the trees and with the access to them."

A suit for a declaration of the plaintiff's title to a mokur-rurce will bar a suit for the amount the plaintiff may be entitled to on account of that title, when the former suit was brought because the defendant by his denial of that title prevented the Collector who held the amount in deposit from paying it to plaintiff. This was held in *Luchmun Sahoy v. Ramsaru*,¹³ Mr. Justice Phear in his judgment in which case said that plaintiff "relied solely upon establishing his title in that suit in order to be enabled to get payment of the money; and he complains in the very last passage in his plaint that, notwithstanding he got a decree for his title, the defendant would not let him get the Rs. 23 out of the Collectorate. It is very clear to me that he is barred from bringing this suit by the simple reason that he brought a suit before, which, as against the present defendant, was based on the same cause of action which he now sues upon, and that inasmuch as he might in that suit have made the present claim, he cannot bring a second suit on the same cause of action for that purpose." In *Nund Lall v. Aboo Mahomed*,¹⁴ the first suit comprised also the land which had been taken over by the Government for public purposes, as the plaintiff did not know of that fact, and a subsequent suit for

the amount of compensation which the defendant had received from the Collector after the decree in the former suit, was held to be not barred, as the plaintiff at the time of the first suit had no cause of action in respect of the money against the defendant.

A suit for the specific performance of contract for the sale of land which the defendant sold to another person, will bar a subsequent suit for damages for the loss of the interest on the amount of consideration paid by the plaintiff, and for the deprivation of the profits that would have accrued to the plaintiff if the sale had been made to him in accordance with the contract; as the cause of action in both the suits is the same breach of contract. This was held in *Shib Kristo Dah v. Abdool Sobhan*,¹⁵ in which it was contended that Sec. 7 did not apply as "P. (the subsequent alienee) was made a defendant in the former suit, and issues might have arisen between P. and the plaintiff in that suit, who is also the plaintiff in the present suit." The contention was overruled, the Court observing that as between the Mahomedan defendant (the vendor) and the plaintiff, there was nothing to prevent the plaintiff from including in his claim any damages accruing from the breach of the contract entered into between the plaintiff and the said Mahomedan defendant."

Even a suit for damages for breach of a contract for delivery of certain material has been held to bar a suit for the recovery of the money advanced towards the cost of the material, the Court observing that "when a party brings a suit upon a contract, he affirms it, and must seek his remedy under it for every right which the contract secures to him, and which has been withheld by the other party. The contract, when thus affirmed, constitutes an indivisible claim to indemnity, which cannot be divided into several claims and a part recovered in one action and a part in another."¹⁶ A suit for the use and occupation of land is a bar to a suit for injury to the land during the same period of occupation.¹⁷ A contract and a tort connected with it constitute distinct causes of action, and a suit for the hire of a carriage will not bar a suit for the injury done to it during the hirer's use of it.¹⁸

259. A suit for rent at an enhanced rate payable under some law or on account of a special notice will, however, not bar a suit for rent at the original rate,¹⁹ as the contract giving

¹⁵ XV W. R. 498.

¹⁶ Dalton v. Bentley, 15 Ill. 421.

Shaw v. Boors, 25 Ala. 449.

v. Boodhoo, XIII W. R. 317.

rise to the obligation of the payment and the consequent cause of action in the two cases are different. The contrary was held in *Kunnock Chunder v. Guru Dass*,²⁰ as it appeared to the Judges "that looking at the wording of Secs. 42 and 43 of the Code of Civil Procedure, it is clearly the intention of the Legislature that plaintiffs should bring their entire claim and every remedy enforceable in respect of that claim into court at once, and that if they fail to do that in any suit, they cannot afterwards avail themselves of any other remedy on which they have not chosen to insist in the first suit." Cunningham, J., in delivering the judgment of the court said: "It is true that the Privy Council have pointed out that a suit for enhanced rent and a suit for rent are very different proceedings. None the less are they, in our opinion, remedies or claims arising in respect of the same subject-matter." This decision has been overruled by a Full Bench of the High Court in *Sudduruddin v. Bani Madhub*,²¹ Wilson, J., having pointed out in the judgment of the Full Bench that the Judges in that case did not address their attention precisely to the point arising on the section, and that a suit for enhancement and a suit for rent may, no doubt, be correctly said to be in respect of the same subject-matter, but they are not claims arising out of the same cause of action.

In *Doorga Nath Roy v. Kalee Narain*,²² a suit by a lessor for certain lands which the lessee had, in accordance with the power given to him by the lease, resumed on behalf of the lessor and himself retained was held not to bar a suit by the lessor for the land the lessee had actually taken on lease; Jackson, J., in delivering the judgment of the High Court observing that "these appear to us to be entirely distinct causes of action, although the plaintiff's title to recover is the same, and the defendant's opportunity of doing two wrongs is the same." A suit for the cancellation of a deed of gift of certain property on the ground that the defendant had not taken possession or executed a release of it, will not bar a suit to obtain a declaration that the deed was nominally executed and was not intended to take effect, and that notwithstanding that the defendant, since the dismissal of the first suit, was setting up a claim to it, as though the relief sought in both the suits is substantially the same, the cause of action put forward in the second suit is different from that in the first.²³

²⁰ I. L. R. IX Cal. 919.

²¹ I. L. R. XV Cal. 145.
XXIV W. R. 21

41.

c. Ponnusami I. L. R. XIII Mad.

In *Ambu v. Kettilamma*²⁴ a suit by a claimant of the property attached in execution proceedings, to set aside the auction sale of the said property, has been held not to bar a subsequent suit for its possession. This decision was based chiefly on the circumstance that the grounds of action in the two suits were not identical, and Muttusami Ayyar, J., in his judgment said that "Sec. 283 (Civil Procedure Code) gives a special right to sue for a declaration of title by reason of the special attribute with which the order on the claim petition is invested, unless it is invalidated. The right is one which the plaintiff is at liberty to exercise without reference to the court sale and the transfer of possession under such sale that may or may not at once follow the order After the claimant's title has been declared, he must no doubt sue but once, both to set aside the sale and recover possession, but, until such declaration is made, the sale and transfer of possession are in the nature of successive wrongful acts originating from the invalid order rather than of remedies which he is bound to claim in the declaratory suit which is specially allowed." Nor will a suit for recovery of,²⁵ or a declaration of title in,²⁶ property attached in execution bar a suit for damages for wrongful attachment.

A balance on an account stated and an omission to account for the assets of a partnership, entered into between the parties on the day of the statement of accounts, were held in *Subbayya v. Venkatesappa*,²⁷ to be distinct causes of action, and a release given for all demands under duress being a wrong by defendant himself, could not be set up by himself, and could not operate as a merger of the two causes of action, and, therefore, a suit brought for the balance, coupled with a prayer for the setting aside of the release, might not bar a subsequent suit for the dissolution of the partnership, as the allusion to the execution of the release was by way of an answer to a plea, which, it was anticipated, might be founded upon it, and the prayer for the cancellation of the release was regarded only as ancillary to the primary relief, *viz.*, the recovery of the balance. A suit against some of the heirs of a debtor for the portion of the debt payable by them will not bar a suit against the other heirs of the debtor for the balance.²⁸ A suit on a contract induced by fraud is not a bar to a suit for the fraud itself.²⁹

²⁴ I. L. R. XIV Mad. 23.²⁵ Dawson v. Baum, 10 Pac. Rep. 40.²⁶ Lenoir's Adm'r. v. Wilson, 36 Ala. 600.²⁷ I. L. R. VI²⁸ Parunsookh v. Soobhan, 11 Agra. 323.²⁹ Wanzer v. De Baun, 1 N. D. Smith. (N. Y.) 261.

Morgan v. Skidmore, 3 Abb. New Cas. 02.

260. A suit for a declaration of title to a property, if dismissed on the ground that the plaintiff not being in possession of that property was not entitled to a declaration, was held in *Jibunti Nath v. Shib Nath*,⁵⁰ not to bar a subsequent suit for the possession of that property, brought on the ground that the defendant on account of the decision in the former suit sued and obtained decrees against some of the tenants of the estate, and thus led to an active disturbance of the plaintiff's possession. This decision was followed in *Komola Kaminy Debia v. Loke Nath*⁵¹ by Cunningham and Tottenham, J.J., who observing that in the first suit "There was not any intentional and voluntary abandonment by the plaintiff of any portion of his claim or of any remedy to which he was entitled," added that "they could not think that where a plaintiff, mistakenly believing himself to be in possession, sues merely for a declaratory decree, and where, in accordance with this rule, the court finding him not to be in possession, dismisses his suit on this ground, without any enquiry into his rights, he is precluded from subsequently suing for his entire cause of action." Both these decisions were followed in *Nonoo Singh v. Anand Singh*⁵² by Tottenham and Agnew, J.J. A Full Bench of Allahabad High Court held in *Ram Sewak v. Nakched*,⁵³ that a suit to have a declaration of the plaintiffs' right to a share of certain property and to have a deed of gift thereof by a widow (then deceased) set aside will, when dismissed on the ground that plaintiffs are not in possession of the said share of the property, not bar a suit for the possession of the share of the property. Straight, J., in his decision said: "While at the time of the institution of the former litigation their cause of action was the deed of gift, when the present suit was brought something more had accrued to them by reason of the obstruction offered by the respondent to their exercising the right of proprietorship over their shares. In the one case, no possession having been asserted by the respondent, the appellants were not entitled to sue him for possession; in the other case an additional cause of action had arisen, which gave them the right to the further remedy. Under these circumstances, it does not appear to me that the appellants have

I. L. R. VIII Cal. 819, per White and Macpherson, J.J.; followed in *Mohan Lal v. Bilaso*, I. L. R. XIV All. 512.

⁵¹ I. L. R. VIII Cal. 825 (n).

⁵² I. L. R. XII Cal. 291.

⁵³ I. L. R. IV All. 251.

laid themselves under the prohibition of the third paragraph of Sec. 43 of the Civil Procedure Code.”^o Tyrrell, J., said: “It is obvious that the test of the applicability of this rule is to ascertain if the person at the time he brought the former suit was in point of fact a person entitled to more than one remedy in respect of his claim. . . . In the present case the court had found when the first suit came before it that the plaintiffs were not persons entitled to the special form of remedy or relief they sought to obtain by that suit in respect of their claim, namely, the remedy by way of declaration of the unlawful character of the invasion of their reversionary rights and interest, but that under the circumstances disclosed and ascertained in regard to the possession of the parties after the widow’s death, the plaintiffs had no such remedy, and that their only remedy was by way of a suit for clearance of their title and removal of disturbance to their possession, that is to say, by bringing such a suit as the plaintiffs brought in November 1879. It is not suggested that the plaintiffs had any other remedy than this, failing the mistaken one for which they were non-suited: and thus the action of the court itself in the determination of the first suit cleared from the plaintiffs’ path the obstruction of this provision of Sec. 43. It was then determined, and the decision has become final, that the plaintiffs were then ‘persons entitled in respect of their claim to one remedy only,’ and that they were mistaken in entertaining the belief to the contrary under which they had been led to bring the bad suit for another supposed remedy which was then dismissed. In this view of the law it was an error to defeat the plaintiffs on the threshold of their present suit with the objection that they were persons who, having been at the time of the first action entitled to more than one remedy in respect of their claim, had elected to sue for one remedy omitting the other remedy which they now seek to obtain in their present suit. At and after the death of the widow and on the assumption by her donee of her possession the plaintiffs had no other remedy than that which they are now asking by the present suit, and they cannot be barred by a rule prohibiting persons who have in fact alternative remedies, and have elected

^o In *Kalidhun v. Shiba Nath*³¹ a Full Bench of the Calcutta High Court held that a suit for a declaration of the plaintiffs’ right to an account, even if successful, would not bar a subsequent for the account itself, but the decision proceeded on Sec. 15 of the Civil Procedure Code of 1859, and the Full Bench itself observed that the result of that judgment would not be very material in the future.

³¹ I. L. R. VIII Cal.

to sue their adversaries on one of such omitting others, from bringing a suit for the omitted alternative relief."

261. It is a generally accepted rule that a suit on a collateral security given for a debt will not bar a suit for the debt itself.³⁵ Thus a suit against only the indorser of a note extinguishes and merges the cause of action arising upon his contract of indorsement, but does not bar a suit on the contract obligation of the debtor.³⁶ So where a creditor receives a draft on a third party, indorsed by the debtor, as collateral, a judgment in favor of the debtor in a suit on the draft is not a bar to an action on the debt.³⁷ Mr. Black says³⁸ that, "The converse of this rule is also good law. The recovery of a judgment against a principal debtor on a note given by him, is no bar to an action against him and another on a note given as collateral security for the debt of the principal, unless such judgment has been satisfied."³⁹ Thus a judgment for a debt does not bar a suit to enforce a mortgage or other lien given to secure its payment.⁴⁰ Sec. 43 provides a contrary rule, and a Division Bench of Allahabad High Court held in *Gumani v. Ram Padarath*,⁴¹ that a suit for money due on a bond hypothecating property would bar a subsequent suit in respect of the same cause of action for enforcing the lien.

The Full Bench of the Calcutta High Court in *Jonmenjoy Mullick v. Dossmoney Dossee*⁴² is not against that view as it only held that a mortgagee did not lose his lien by taking a mere money decree. Sir Richard Garth observed in the judgment of the court that "having enforced one remedy without fully realizing his debt, he may afterwards proceed to enforce the other," but it is to be borne in mind that this observation was made with reference to Sec. 7 of the Civil Procedure Code of 1859, which did not, at least in express words, provide against the splitting of remedies.⁴³ But even under that section, a suit for rent was held in *Chunni Lal v. Banaspat Singh*,⁴⁴ not to bar a subsequent suit to realize the same from property hypothecated for it, Oldfield and Tyrrell, JJ., having observed that, "the plain-
's right of suit to enforce the mortgage arises by reason of

³⁵ *Drake v. Mitchell*, 3 East, 251.
Fairchild v. Holly, 10 Conn. 475.
Chipman v. Marten, 13 Johns. 240.
³⁶ *Howell v. McCracken*, 87 N. Car. 300.
³⁷ *Betterton v. Roopo*, 3 Lea. 215.
³⁸ 31, Ind. 395.
³⁹ *McCullough v. Hellman*, 8 Oreg. 101.
White v. Smith, 75 Am. Dec. 580.

Fisher v. Fisher, 94 Mass. 309.
⁴⁰ *Kempker v. Comer*, 73 Tex. 196.
Muncie v. Brown, 112 Ind. 474.
⁴¹ I. L. R. II All. 838.
⁴² I. L. R. VII Cal. 714.
⁴³ *Vide Jibunti Nath v. Shib Nath* I. L. R. VIII Cal. 519.
⁴⁴ I. L. R. IX All. 23.

there being an existing debt for rent, and remains till it is satisfied, or so long as he can institute a suit to enforce the mortgage. The mere taking of a money-decree does not extinguish the creditor's lien."⁴⁵ The effect of the last clause of Sec. 43 was not considered in this case, though that Section was generally referred to. But Sec. 43 is to be construed in regard to the mortgaged property as subject to Sec. 99 of the Transfer of Property Act (IV of 1882), which provides that a mortgagee may institute a suit for the sale of the mortgaged property under Sec. 67 of the said Act, notwithstanding anything contained in Sec. 43 of the Civil Procedure Code.

262. A suit for maintenance against certain persons will bar a suit to have the maintenance charged on certain property. This was held directly in *Rangamma v. Vohalayya*,⁴⁶ in which it was contended that the two claims were different and did not arise out of one and the same cause of action, and that a widow or other female member of a family entitled to maintenance might have cause to sue for maintenance without having at the same time sufficient cause to demand that the maintenance be made a charge on the property or any part thereof; and that, if, subsequently, the manager of the family or others were to commit waste, or alienate any part of the property, the claimant would be at liberty to come in and sue to have the maintenance already awarded made a charge upon the property. Sir Collins, C. J., and Brandt, J., overruled this contention, observing that, "On the principle to which effect is given by the provisions of the Code of Civil Procedure, the plaintiff was bound, when she sued in 1878, to have asked, for all the remedies in respect of the right of maintenance, to which she was then entitled, and that these claims did arise out of one and the same cause of action, that cause of action being the right to maintenance." A somewhat contrary opinion was expressed by Sir Richard Gath, C. J., in *Pramada Dasi v. Lukhi Narain*,⁴⁷ but the decision in that case turned on another point.

⁴⁵ *Momtazooddeen v. Rajcoumar*, XV B. L. R. 408.
⁴⁶ I. L. R. XI Mad. 127.

See also *Sam'nath v. Rangatham*
 I. L. R. XII
 I. I. B. XII

CHAPTER XI.

LIS PENDENS.

263. There is another class of cases also, in which the trial of a suit is held barred by the pendency of another suit in which the same matter is directly and substantially in issue. The object of this rule is to prevent a collision between courts ; and to secure to the parties “ a certain and unfluctuating adjudication of their rights, and at the same time avoid the vexation of unnecessary suits.” It has been pointed out in some of the American cases,¹ that the “ pendency of another suit, upon the same cause of action, in another court of concurrent jurisdiction, cannot be pleaded in bar, although it is good in abatement.” It may be said that practically the effect of the plea is that of a bar, as the abatement can come to an end only with the decision of the former suit, when its place must at once be taken by that of *res judicata*.

The distinction has, however, been held to be real and of practical importance. Thus in *Hurd v. Moiles*,² the United States Circuit Court for the Western District of Michigan, said : “ It is quite likely that there is a distinction between those cases where the question is whether the former suit is one pleadable in strict abatement of the second, and those where the pendency of the former suit is presented as a ground for staying proceedings in the second. There would seem to be something of practical substance in that distinction, and, if so, it would furnish ground for holding that in order to be pleadable in abatement the first suit must be for the same purpose as the second, and substantially the same relief obtainable, and *vice versa*. I shall be required to hold that when the subject-matter has been drawn into another jurisdiction for some purpose which may involve a decision upon its merits, the court should stay the second suit brought for a different purpose, and for relief not obtainable in the

¹ Hon. Lis. Pend. 426.

² Whitaker v. Bramson, 2 Paine, 209.

Wilcox v. Kassick, 2 Mich. 165.

³ 28 Fed. Rep. 899.

first suit, until the determination of the first, when the subject-matter is released from the hold of the court, impressed or not by the adjudication which that court had made." It has been held that a former suit will not constitute *lis pendens*, unless a judgment recovered therein will be *res judicata* in regard to the second suit,⁴ but the converse is certainly not true, and every suit in which a judgment will be *res judicata* need not be *lis pendens*.

To constitute *lis pendens*, it is primarily necessary that both the suits should be for the same relief and in the courts of the same State; and thus, enunciated in general words, the rule has been said to be that the subsequent suit will not be barred unless the case is the same, the parties the same or at least such as represent the same interest, the same rights are asserted and the same relief prayed for on the same facts and title, or the essential basis of the relief is the same.⁵ Mr. Bennett observes that "the plea of *lis pendens* should aver that the second suit is for the same subject-matter as that of the first; that the same issue is joined in the two suits, and that the proceedings in the former suit were taken for the same purpose."⁶ The rule, it may thus be seen is, though analogous, yet not co-extensive with the doctrine of *res judicata*, or with that of bar by suit.

264. In British India, the rule is enacted in Sec. 12 of the Civil Procedure Code, which provides, that "the Court shall not entertain any suit in which the issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other court, whether superior or inferior in British India, having jurisdiction to grant such relief, or in any court beyond the limits of British India, established by the Governor-General in Council and having like jurisdiction or before Her Majesty in Council." In *Balkishan v. Kishan Lal*,⁷ Mr. Justice Mahmood said: "It is scarcely necessary to say that the rule contained in Sec. 12 of the Code of Civil Procedure forms no part of the rule of *res judicata*, though the reason upon which it is based is in some

⁴ *Coles v. Yorks*, 31 Minn. 213.
⁵ *Watson v. Jones*, 11 Am. Law. Reg. 430.

⁶ *Ben. Lit. Pen.* 412.
⁷ *I. L. R.* XI All. 154.

respects similar in principle to the doctrine of *res judicata*. The distinction between the two rules, however, is vast. The rule in Sec. 12 relates to matters *sub judice*, whilst the rule in Sec. 13 relates to matters which have passed into *res judicata*. The one bars only a 'suit;' the other bars both the trial of a 'suit,' and of an 'issue' subject to their respective conditions. Those conditions are not all the same in Sec. 12 as they are in Sec. 13, and the wording of the two sections as to the distinction is so clear that it is not easy to confound the two rules. Now, in Sec. 12 before the plea can operate as a bar, the second suit must not only raise the same issue as that in the former suit still pending, but it must be for the same relief. . . . The object of the rule contained in Sec. 12 is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of the law is to confine the plaintiff to one litigation, thus obviating the policy of contradictory verdicts by two or more courts in respect of the same relief." And to give full effect to the rule, it has not been restricted, as held in some cases in the United States, to the cases in which the previously instituted suit should be pending in a court of equal or superior jurisdiction to that in which the subsequent suit is instituted.

265. The first essential of the rule is that there should be a previously instituted suit. In *Meckjee v. Devachand*,⁸ Pontifex, J., without even referring to Sec. 12, observed in the course of the argument, that "priority of time is the proper guide in determining which suit should be allowed to proceed"; and in his judgment spoke of it as a general rule, "that the plaintiff who first brings his suit, claiming an account in respect of any particular transactions, has a right to have that account taken in the court in which he has chosen to bring his suit." The rule of the American Courts is that the plea should actually aver that proceedings have in fact been taken in the former suit, such as an appearance or the service of process requiring an appearance. Mr.

Existence of prior suit is essential to the application of *lis pendens*.

Bennett says that "a plea in abatement of a prior action pending for the same cause should show that summons had been issued and served on the defendant, or that he had voluntarily appeared in the cause, otherwise it would not appear that the suit is pending."⁹ Mr. Freeman observes¹⁰ that "the authorities agree that when a court has obtained jurisdiction over an action, it is entitled to pursue such jurisdiction to final judgment, and that, its jurisdiction cannot be divested by the bringing of another action in a court of concurrent jurisdiction, and that, notwithstanding the bringing of the second action, the court first acquiring jurisdiction will not hesitate to proceed, irrespective of what may be done in the other action by the other court."¹¹ So far as we are aware, no instance has ever occurred in which the court last acquiring jurisdiction has proceeded to judgment and sought to enforce such judgment notwithstanding the pendency of the prior action. . . . It seems impossible that two courts can, at the same time, possess the power to make a final determination of the same controversy between the same parties. If either has authority to act, its action must necessarily be exclusive, and therefore it is our judgment that whenever either the State or the national courts acquire jurisdiction of an action and the parties thereto, this jurisdiction cannot be destroyed, diminished, or suspended by one of the parties bringing an action in another court, and that any judgment or order of the latter court is void so far as it conflicts with any judgment or order of the court first acquiring jurisdiction."

266. The second essential of the rule in British India, as well as elsewhere, is that the relief claimed in the previously instituted suit should be the same. "Where the relief sought in the two cases," says Mr. Bennett, "is different, the defence of *lis pendens* cannot be interposed, although the same question may, to some extent, be involved in the two actions. A holder of bonds secured by mortgage on real estate may have ejectment to recover the land, a bill to foreclose, and

⁹ Ben. Lis. Pend. 402.

¹⁰ Fr. Jud. 181.

¹¹ Taylor v. Taintor, 16 Wall. 366.
Merrill v. Lake, 47 Am. Dec. 377.

¹² v. Spink, 62 Am. Dec. 214.

¹³ v. Rawson, 2 Am. Rep. 581.

¹⁴ v. James, 23 Am. Rep. 412.

¹⁵ v. Brinkhead, 84 Va. 612.

an action *in personam* on the bonds, and in such a case neither of the suits will bar the other."¹²

It has often been said that the plea should aver expressly that the subsequent suit is for the same subject-matter as the first,¹³ and seeks the same or similar relief. A Full Bench of Allahabad High Court held in *Bal Kishan v. Kishan Lal* that a suit for *malikana* for the year 1293 would not be for the same relief as that for *malikana* for prior years; Mr. Justice Mahmood observing that "it would be a most unsatisfactory rule of law to hold that the pendency of a litigation connected with the rent, *malikana* or any other demand for one year should bar a suit for a subsequent year; for if such were the rule, the prolongation of the earlier litigation might result in barring the later suit by lapse of the limitation period." The same view was taken by the Calcutta High Court in *Bissessur Singh v. Gunput Singh*.¹⁴ On the same principle, the pendency of a suit to restrain the infringement of a patent and to obtain an account of profits has been held not to bar a subsequent suit for an injunction and for an account founded upon a subsequent infringement.¹⁵ In some American cases, the proceedings have been stayed in the previously instituted suit, when that was only for a part of the relief, and the subsequent suit for the whole relief.¹⁶

267. The third essential of the rule is the identity of the parties. It is not necessary that the parties should be precisely the same as in the former suit. Thus, if the plaintiff after instituting a suit sells a part of the property in dispute in it to another, who brings his claim asserting his right to that part, the plea and defence of the former suit, with respect to the whole property and with the original party, will be a good plea as against that claim.¹⁷ It is necessary, however, that the parties to the second suit should be suing or sued in the same capacity as in the first.

If the suits are brought in a different right or character, the plaintiffs, although the same persons in fact, may

¹² Ben. Lis. Pen. 401.

¹³ *Devie v. Brownlow*, 2 Dickens, 611.

¹⁴ VIII C. L. R. 113.

¹⁵ *Roemer v. Newman*, 19 Fed. Rep. 98.

¹⁶ *Massachusetts Mutual Life Ins. Co. v. Chicago R. Co.*, 13 Fed. Rep. 857.

¹⁷ Ben. Lis Pend. 413.

be said to sue in contemplation of law as different persons, and the suits cannot, in law, be considered as brought by the same person, and the relief asked for in the second suit could not be had and obtained in the former. Thus, where an administrator sued as the representative of an estate, and having afterwards procured administration *de bonis non*, brought another suit in that capacity, the plea of *lis pendens* was held not to apply, Lord Harwicke observing that where the same person sues in different capacities it is the same as if there were different persons.¹⁸

The plea has been held not to apply where although the parties are the same yet their position is reversed, the plaintiff in the former suit being the defendant in the subsequent suit, and the defendant in the former suit being the plaintiff in the subsequent.¹⁹ On the same ground, a cross-suit, although between the same parties will not be barred by a plea of *lis pendens*. Thus, where a suit has been brought to foreclose a mortgage, the defendant may, while it is pending, bring and prosecute a suit for redemption of the same.²⁰

The fourth essential from a general point of view is that the previously instituted suit should be pending in some court in the same State. In England also the pendency of a prior suit in a foreign State is held to be no bar to a second suit.²¹ In *Dillon v. Alcares*,²² the bill prayed that the several deeds of annuity and bonds executed by the plaintiff might be delivered up to be cancelled upon discharging what might appear to be fairly due to the defendant, and that an account might be taken. The defendant pleaded that the bill was barred by the pendency in the Court of Chancery in Ireland of a former bill presented by the plaintiff for the same matter, and to the same effect, and for the same relief and purpose. Lord Loughborough, L. C., over-ruled the plea, however, saying "where a man has an estate in England and another in Ireland, the suit must go on in both countries." Ireland has since that decision ceased to be considered in England a foreign country for the purposes of judicial administration, but the principle of

Vide Neve v. Weston, 3 Atk. 557.

Law v. Rigby, 4 Bro., Ch. 60.

Gage v. Stafford, 1 Ves. Sr. 544.

Taylor v. The Royal Saxon, 1 Wall. Jr. C. C. 311.

of Mahogany, 2 Sum.

Lis

White v. Whitman, 1 Curtis, 499

4 Ves. 357.

the decision is still important. The decision of the Court of Common Pleas in *Cox v. Mitchell*,²³ is a direct authority against the stopping of proceedings in a suit in one country on the ground of the pendency from before of a similar suit in the courts of another country. The principle of the decision in this case was followed by Chitty, J., in *McHenry v. Lewis*,²⁴ and that decision was confirmed on appeal,²⁵ though with certain observations as to the existence of an inherent jurisdiction in every court to prevent all abuse of its process, and to stop any proceedings that may appear to be taken merely to harass any other parties to them. The decision on appeal distinctly recognized the authority of the decision in *Cox v. Mitchell*, at least to all the extent covered by the rule of *lis pendens*. Bowen, L. J., said, "It simply lays down the proposition, that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same. So understood, it seems to me to be common sense." Sir George Jessel further said: "I see no reason on principle why, if the court is satisfied that the defendant is being improperly vexed, the mere fact of one of the actions being in this country and one in a foreign country should prevent the court protecting the defendant from being so improperly vexed. I am not sure that what I have stated really conflicts with the judgment in the case of *Cox v. Mitchell*. In one view, it does not so conflict. If the true view of the judgment is, that *prima facie* a man is not doubly vexed, when the action is brought in the two countries, but that you want a special case to show that he is doubly vexed, then there is no conflict of opinion. . . . In this country, where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do. . . . But where it is in a foreign country it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different. . . . We know that in foreign countries various laws apply, as regards the remedies, of a totally distinct character from the laws regulating the remedies in this country, so that it is by no means to be assumed in the absence of evidence that the mere fact of suing in a foreign country as well as in this country is vexatious. It

²³ 7 C. B. (N. S.) 55.
²⁴ 21 Ch. D. 202.

| ²⁵ 22 Ch. D.

seems to me that you must make out a special case, and there is therefore that distinction between the case of the two actions being brought in the Queen's Courts, and one action being brought in the Queen's Court and the other in the Court of a foreign sovereign." The court unanimously negatived the existence of such a case justifying interference with the progress of proceedings. All the judges, however, observed that they did not agree with the decision in *Cox v. Mitchell*, "if it lays down as a general principle that this court cannot interfere where one of the actions is in England and the other in a foreign court." This observation was entirely unnecessary for the decision of the case. Cotton, L. J., in support of the observation said: "I find that Lord Cottenham in *Wedderburn v. Wedderburn*,²⁶ lays down the rule with reference to suits in England and abroad in these terms. 'There can be no doubt that the general rule precludes parties from proceeding in any other court for the same purpose for which they are proceeding in this court, whether the other proceedings are taken in this or in any other country;' and, again, Lord Cranworth in *Carron Iron Company v. Maclaren*,²⁷ says: 'where, therefore, pending a litigation here in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings.'" Lord Cranworth was evidently referring to a principle quite different from that of *lis pendens*. Similarly, Lord Cottenham went on to add that "if the party conceives there are any circumstances in his case which constitute an exception to the rule, I think that his proper course is, not to take proceedings in another court, of his own authority, but to apply to this court for permission to take such proceedings." This qualification of the proposition cited by Cotton, L. J., shows that Lord Cottenham did not intend to lay down a positive rule like that of *lis pendens*, in the face of which no court could grant permission for the institution of the same proceedings in any court. The entire proposition was, besides, a mere *obiter dictum*, as the subsequent proceedings which were asked in an English court to be stopped were taken in a Scotch Court merely to get security for the payment of the amount that the English Court might decree

²⁶ 4 My. & Cr. 506.| ²⁷ 5 H. T. Cas. 497.

to be paid, and the Lord Chancellor refused to stop those proceedings."

The rule in the United States of America is much the same. The pendency of another suit even in a court of another of the States or of a foreign country has been held not to bar a suit for the same relief in a Circuit court of the United States.²⁸ Thus Mr. Justice Clifford in *Loring v. _____* said that "the English cases go no further than to hold that the plea of another suit depending will be good, if the first suit was instituted in the same jurisdiction. Such a plea is not a good one in the courts of that country if the first suit is pending in another country, nor in the colonies of the parent country."²⁹ The weight of American authority also is decidedly to the same effect. The undeviating rule in this Circuit has been that the pendency of another action for the same cause in a State court is not a good plea in abatement.³¹ The same rule is established in most of the States.³²

269. The rule of *lis pendens* not only affects a suit brought while another suit is pending, but also alienations or transfers of rights or interests in any property made Decision in a suit is binding against *pendente lite* alienees.

* In Daniell's Chancery Practice,³³ it is said that 'a plea of another suit depending would not have been a good plea, if the suit was depending in a court in another country'; but it is added, "Now, however, if there is a *lis alibi pendens* before a foreign court which can afford a complete remedy an objection lies to proceedings in an English Court, whether such proceedings are *in rem* or *in personam*."³⁴ And in a clear case this objection may be raised by an application to stay further proceedings in the action.³⁵ The decisions cited in support of the view do not, however, quite bear on the doctrine of *lis pendens*. In *Wilson v. Ferrand*, the proceedings were declined to be stopped. In *Catterina Chizzaro*, the former proceedings were in the High Court of Admiralty of Ireland, and the defendant put a cross-claim, and the plaintiff's application to stop the proceedings in that suit had been dismissed by the said court. The plaintiff had put in a claim in respect of the same cause even for a larger amount than he had claimed in Ireland, and Sir Robert Phillimore dismissed that suit, as "no doubt, apart from technical considerations, it would be a most inconvenient course of proceeding to allow the same case to be heard at the same time in two different courts." In *Norton v. Florence Land Co.*, there was a motion on behalf of the holders of obligations issued by the Florence Land Co., to restrain the Anglo-Italian Bank from selling the Company's property at Florence, of which they were mortgagees; and Sir George Jessel, M. R., dismissed it *inter alia* on the ground that the Bank had "taken proceedings in the Court of Florence, the proper court having jurisdiction to establish their title; and litigation there to which the plaintiffs are or may be parties being in the court of the country having actual jurisdiction over the subject-matter, and having entertained that jurisdiction by a prior litigation, it is contrary to all the rules of the comity of nations that this court should actively interfere between the same litigants."

²⁸ Post. Fed. Prac. 232.

²⁹ Insurance Co. v. Brune, 96 U. S. 588.

³⁰ 2 Cliff. U. S. O. O. 311.

³¹ Maule v. Murray, 7 T. R. 278.

³² Im'ay v. Ellefsen, 2 East, 453 ;

³³ White v. Whitman, 1 Curt. 494 ;

Lyman v. Brown, 2 Curt. 559 ;

Wadleigh v. Veasie, 3 Sum. 165.

³⁴ Brown v. Joy, 2 Johns. 221 ;

v. Durkin, 12 Johns. 99 ;

Megilton v. Love, 54 Am. Dec. 449.

Mitchell v. Brune, 2 Paige Ch. 606.

Vide, however, Bell v. Donohue, 47 N. Y. Sup. 458.

Parmalee v. Wheeler, 32 Wis. 429.

³⁵ L. 439

³⁶ Catterina Chizzaro, 1 P. D. 262.

Norton v. Florence Land Co., 7 Ch. D. 232.
18 Eq.

during the pendency of a suit concerning that property. As a natural result of this doctrine, a judgment in a suit is binding also on persons who, though not parties to that suit, derive their interest pending that suit from either of the parties thereto. This is virtually another extension of the doctrine of *res judicata* in regard to persons, and was recognized even by the Romans among whom the *res* from the commencement of *lis* became *litigiosa* which neither of the parties could alienate; the subject in dispute after *litis contestatio* became litigious and passed into *quasi-judicial* custody, and both parties came under an obligation not to withdraw it from the decision of the judge.³⁶

The Roman Law thus expressly provided, *Rem de qua controversia prohibemur in acrum dedicare*, and from that law the rule has, with some modifications, been transplanted into the jurisprudence of the countries of continental Europe. In England also the rule is of a very ancient date; and *pendente lite nihil inonvetur* is an old maxim of the English Common Law.

By 28 Edw. I. Ch. 11, a *pendente lite* purchase was declared champertous, and the English Courts held under that statute, that conveyances made *pendente lite* were void.³⁷ As pointed out by the Lord Chancellor (Cranworth) in *Bellamy v. Sabine*,³⁸ "in the old real actions, the judgments bound the lands in suit notwithstanding any alienation by the defendant pending litigation."

The rule was in early times engrafted on the practice of the Equity Courts, and was universally recognized in the time of Lord Bacon who in his Ordinances laid it down that "no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order; but, when he comes in *pendente lite*, and, while the suit is in full prosecution, and without any color of allowance or privity of the court, then regularly the decree bindeth; but if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice."

³⁶ Mack. Rom. Law, 320.
 Tom. Mod. Rom. Law, 19.

³⁷ XII Encyc. Law, 808.
³⁸ 1 De G. & J. 560.

In *Sorrel v. Carpenter*³⁹ Lord Chancellor King said, "Where there is a conveyance made *pendente lite*, without any valuable consideration, and to avoid and exclude a decree, it is to be highly discountenanced, and even though the alienation be for never so good a consideration, yet if made *pendente lite*, the purchase is to be invalid."

Lord Chancellor Camden in *Walker v. Smallman*⁴⁰ said: "The question is, where a bill is filed by a creditor for sale of an estate to pay debts, and all the parties have put in answers and submitted to the jurisdiction, whether the heirs at law or devisee can sell without the privity of the court or creditors. . . . I hold it a general rule that an alienation pending suit is void. The modern doctrine is that it is merely voidable by the result of the suit." Thus Sir William Grant, M. R., in *Bishop of Winchester v. Paine*, after observing that "ordinarily, it is true the decree of the court binds only the parties to the suit," said: "He who purchases during pendency of the suit is bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. It is to them as if no such title existed." This observation was cited with approval in *Metcalfe v. Pulvertoft*,⁴¹ in which Vice-Chancellor Plumer pointed out that the concluding passage of Lord Camden's judgment in *Walker v. Smallwood* "declaring, as a general rule, that an alienation pending a suit is void, must be understood with reference to the subject he is speaking of, not absolutely." Referring to the maxim cited above, the learned Vice-Chancellor said: "The true interpretation of this rule is, that the conveyance does not vary the rights of the parties in that suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit, and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be indeterminable; if one party pending the suit could by conveying to others

³⁹ 2 P. Wms. 484.
⁴⁰ Amb. 677.

⁴¹ 2 Ves. and Bea. 200.

create a necessity for introducing new parties. The voluntary act therefore of the defendant, conveying to another, cannot vary the situation or affect the rights of the plaintiff. The *lis pendens* is presumptive, if not actual, notice; and the purchaser is in the same situation, in which the vendor stood; upon this plain principle, that the suit is to be decided according to the state of things, when it was instituted; and the rights, however they may be varied by death, bankruptcy, etc., cannot be affected by the voluntary act of either party. This is the principle running through all the cases both at law and in equity. *Sorrel v. Carpenter*,⁴² *Turner v. Richmond*,⁴³ and the obscure case in Chancery cases,⁴⁴ do not go further than avoiding the conveyance with reference to the suit depending, not to all purposes."

The English statute was substantially re-enacted in New York, and the courts there in construing it followed the English cases. The doctrine as to the effect of *lis pendens* has undergone a change there also, and it is now agreed upon in the United States that the effect of the rule is not to annul the alienation, but to render it subservient to the rights of the parties to the suit, the alienation not being void on account of *lis pendens*, but voidable only.⁴⁵ Mr. Bennett in his article on *lis pendens* lays it down as a general rule that, "during the pendency of the suit the property may be sold, the purchaser taking it subject to the title of his grantor as determined by the suit;⁴⁶"⁴⁷ and the title of the purchaser not being affected unless the suit terminates adversely to his vendor.⁴⁸ Mr. Bennett in his Work on *lis pendens* says,⁴⁹ "Conveyances *pendente lite* are not prohibited and held void, but the interest of the grantor passes subject to the final determination of the pending cause." It has been repeatedly held by the American courts that in accordance with the rule of *lis pendens*, an alienation or transfer of the subject-matter of a suit, made while the suit is being prosecuted with due diligence, is void as against the judgment finally rendered in the suit.⁵⁰ In *Brightman v. Brightman*,⁵¹ the Rhode Island Supreme Court

⁴² 2 P. Wms. 482.

⁴³ 2 Vern. 81.

⁴⁴ Ch. Cal. 300.

⁴⁵ *Cromwell v. Clay*, 1 Dana, 570.

Camp v. Forrest, 13 Ala. 120.

⁴⁶ *Taylor v. Adam*, 115 Ill. 570.

Brooks v. Davey, 100 N. Y. 495.

Rupe v. Hadley, 113 Ind. 416.

Whiteside v. Haselton, 110 U. S. 206.

Armistead v. Foster, 69 Ga. 372.

Dancy v. Duncan, 96 N. Car. 111.

Gould v. Hendrickson, 96 Ill. 500.

⁴⁷ XIII. Encyc. Law, 897.

⁴⁸ *Worham v. Boyd*, 60 Tex. 401.

⁴⁹ *Vide* p. 244.

⁵⁰ *Noon v. Crowder*, 72 Ala. 79.

Walker v. Douglas, 60 Ill. 425.

Snowman v. Harford, 62 Me. 134.

Leroy v. Rogers, 69 Am. Dec. 84.

⁵¹ 1 R. I. 112.

said : "We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved, takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased *bonâ fide* and paid full consideration for it, will not avail against such judgment or decree."

It appears to be unanimously agreed upon, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset,⁵² or as if he had not acquired that interest. His rights are absolutely concluded by the judgment in the suit.⁵³ And naturally, a purchaser from any such person deriving his title *pendente lite* will also be affected and take subject to the doctrine of *lis pendens*.⁵⁴ An early case in *Virginia* is understood as restricting the doctrine of *lis pendens* to purchases and conveyances from the parties to the suit, and as having no force against a person who obtains a transfer *pendente lite* from some person who, though not himself a party to the suit, obtained his title *pendente lite* from one who was such a party.⁵⁵ This case, so far as our observation extends, has never been affirmed; but the cases necessarily in direct conflict with it do not seem to be numerous.⁵⁶ The general expression that *lis pendens* only affects purchasers from parties to the suit *pendente lite* is of frequent occurrence in the reports. Upon examination of the cases in which such expressions are employed, they will generally, if not invariably, be found to be intended as statements of the rule applicable to transfers made prior to the institution of any suit, or to transfers *pendente lite* of titles existing independent of that in litigation. It would be very strange that if, after the general application of the doctrine of *lis pendens* had been upheld for ages as absolutely indispensable to the administration of justice, a limitation should be imposed necessarily subversive of the whole doctrine. If two or more *pendente lite* transfers are to be allowed to thwart the purposes of a suit, then the principles of necessity and of public policy, of which

⁵² *Tilton v. Coffield*, 93 U. S. 163.

Inloe v. Harvey, 11 Md. 524.

⁵³ *Union T. Co. v. South Ind. Nav. Co.* 130 U. S. 565.

Snowdon v. Craig, 96 Am. Dec. 126.

Pertis v. Hill, 98 Am. Dec. 481.

Pickett v. Ferguson, 55 Am.

Mellen v. Moline, M. I. W. 131 U. S. 352.

Bellamy v. Sabine, 1 DeG. & J. 580.

⁵⁴ *George v. Cooper*, 15 W. Va. 666.

Co. v. Mansean, 62 Wis. 81.

⁵⁵ *French v. Loyal Co.*, 5 Leigh. 627.

⁵⁶ *Norton v. Birge*, 35 Conn. 250.

so much has been said, are to be regarded as decidedly more important than the interests of a *pendente lite* purchaser, but decidedly less important than the interests of his vendee. If the final judgment in any action in reference to specific property may be nullified by two transfers, instead of by one, the difficulty of the extra transfer is not likely to furnish any considerable protection to the judgment."⁴⁵ And the rule applies not only to the suits technically so-called but to other proceedings also, as an illustration whereof reference may be made to bankruptcy proceedings, which must, at some stage of their progress, become *lis pendens*, the object of all such proceedings being to arrest the bankrupt's agency in the further management and control of his estate, and enable the court through its officers and employes to administer it and distribute the assets among his creditors.

270. For the binding effect of a judgment in a suit on *pendente lite* alienees, it is not necessary that they should have been made parties to that suit; because under any circumstances they can claim no rights under such alienations except what belongs to the person under whom they claim. In *Youngman v. Elmira Railroad Company*,⁴⁶ Judge Sharswood, delivering the judgment of the Pennsylvania Supreme Court said: "It is perfectly well settled that incumbrancers who become such *pendente lite*, are not necessary parties to a bill to foreclose, although they are bound by the decree, for they can claim nothing except what belongs to the person under whom they assert title, since they have constructive notice; and there would be no end of such suits if a mortgagor might, by new incumbrances created *pendente lite*, require all such incumbrancers to be made parties." Mr. Bennett says, speaking of a *lis pendente* purchaser: "The party from whom he purchased continues as the representative of his interest, and the purchaser is bound by the result. If admitted as a party he could only prosecute or defend in the shoes of his grantor. The court would not permit any new questions to arise in the cause in consequence of such purchase."⁴⁷ Where a purchase has been made of the subject-matter of the litigation pending the suit, it is unnecessary to amend the pleadings setting up the fact of purchase. The *pendente lite* intermeddler must stand

⁴⁵ Fr. Jud. 376.
⁴⁶ 65 Pa. St. 378.

⁴⁷ Ben. Lis. Pend. 272.

in the shoes of his grantor, and has no right to demand to be made a party. There is no new issue which can be tried or formed by reason of the *pendente lite* purchase. The effect of the *lis pendens* is to overreach and annul all conveyances without bringing the party before the court or introducing any proof with respect to the transfer. There is no new issuable fact to be tried or triable.⁴⁸

A *pendente lite* purchaser takes the place of his grantor, and he is therefore not only bound by the judgment in the suit, but the judgment is evidence against him with respect to the subject-matter of the suit, to the same extent as if he were a party to the record.⁴⁹ So strict is the rule that one who takes title or possession from a defendant in ejectment pending the suit is bound by the judgment and can be evicted by the process which shall issue therein, although he is not a party thereto.⁵⁰ In England, it was urged in *Sandon v. Morris*⁵¹ that the plaintiff knew there was another party, and purposely went on in his absence, and without bringing him into court, in order that he might be bound in his absence. Lord Brougham said that it would be a direct innovation of that doctrine (*lis pendens*) and quite unwarranted, either by the principle on which it rests or by anything to be found in the cases which have been decided upon it, if we were to allow an exception of this description, and to enable a purchaser to escape from the effects of the suit by showing that his purchase became known to the party suing the vendor, and that this party afterwards went on without calling upon him or letting him in to defend the suit. Even an assignee in bankruptcy, when the bankruptcy and the appointment of the assignee occur *pendente lite*, is not a necessary party,⁵² though he may sometimes be allowed to become so on special application. Pending a suit against trustees, if other trustees are substituted in place of the original ones after the court has acquired jurisdiction of the defendants and the subject-matter of the suit, the *lis pendens* of the suit will bind the substituted trustees, even though they should not have been made parties.⁵³

It follows from the principle that a *pendente lite* purchaser is not only not a necessary party to a suit, but not entitled

⁴⁸ Ben. Lis. Pend. 297.

⁴⁹ Watson v. Dowling, 26 Cal. 125.

⁵⁰ Sampson v. Ohleyer, 22 Cal. 301.

Hanson v. Armstrong, 22 Ill. 442.

Long v. Neville, 29 Cal. 122.

⁵¹ 5 Sim. 248.

⁵² Young v. Cardwell, 6 Lea. 171.

Yatenian v. Savings Institute, 65 U. S. 764.

Jerome v. McCarter, 94 U. S. 724.

Zane v. Fink, 18 W. Va. 730.

⁵³ Ben. Lis. Pend. 282.

upon his own motion to become such, that such a purchaser has no right to prosecute a writ of error or appeal from an adverse decision against his grantor. The plaintiff, however, has the right to perfect his cause in this way so as to avail himself of the complete remedy which he would have had against the assignor. The court also may permit one acquiring an interest *pendente lite* to appear and prosecute or defend; but it is not a matter of right, nor does it become necessary to the efficiency of the final judgment or decree, that the other parties to the litigation should cause such *pendente lite* claimant to be made a party.⁵⁴ But it has also been said that where a complainant's interest is involuntarily assigned by reason of his bankruptcy, insolvency, or other like cause, the assignee is entitled to supply the defects of the suit, if it has become defective merely, and to continue it so as to enforce the interest or right which has passed to him as the assignee.⁵⁵

Mr. Bennett says: "The general conclusion from all the authorities would seem to be that, where the interest is voluntarily assigned, the assignee or his grantee is an unnecessary party to the suit, because such cases come squarely within the rule of *pendente lite* purchasers. On the other hand, the weight of authority seems to be that where the interest is divested compulsorily or by operation of law, while in most instances the presence of the assignee is not absolutely necessary to the validity of the proceeding, yet it is desirable and expedient where it becomes important that conveyances should be made or other personal acts done by the assignee which can be enforced, otherwise than by his presence in court as a party to the suit. Thus, where it is necessary to compel an assignee to join in a conveyance, such assignee, although not a necessary party for other purposes in the case, is a proper party, at the election of the plaintiff. If the procurement of a conveyance for instance is necessary it may be said that he is a necessary party.⁵⁶ The case is somewhat different so far as relates to a complainant or a defendant, where a defendant goes into a bankruptcy or otherwise loses by operation of law the interest which he had at the commencement of the suit. In such case it may be said that the suit, while it does not abate as to such defendant, is defective for the want of the presence of the assignee in bankruptcy or other assignee. In that case the

⁵⁴ Ben. Lis Pend. 272.
⁵⁵ Ben. Lis Pend. 275.

⁵⁶ Ben. Lis Pend. 26.

assignee should be brought in by an original bill in the nature of a supplemental bill." Thus in *Smith v. Brittenham*,⁵⁷ the plaintiff after the commencement of suit, but before hearing, assigned his interest to another, and it was held that the suit thereby became defective for want of proper parties, and that no valid decree could be entered until the assignee should make himself a party to the cause.

271. *Lis pendens* is often referred to as a lien, though, correctly speaking, it is not a lien, but simply the power or force of jurisdiction of the court, "taking effect upon the subject-matter of the suit, so as to hold it within the grasp of the court for the execution of final judgment." In the earlier cases, the rule was deemed to rest on a constructive notice of the proceedings in the suit, and some of the incidents of the application of the rule still indicate traces of that origin. Thus Lord Hardwicke in *Worsley v. Earl of Scarborough*⁵⁸ said that "all people are supposed to be attentive to what passes" in courts of justice; and Newland in his work on the Law of Contracts⁵⁹ writes that, "the rule is founded on the idea that, as the pendency of the suit is a transaction in a court of justice, all people are supposed to be attentive to what passes there." In *Brightman v. Brightman*⁶⁰ the Rhode Island Supreme Court said: "That the *pendente lite* purchaser would not be permitted to prove that he had no notice of the pendency of the suit. The law infers that all persons have notice of proceedings of courts of record." Adams in his Doctrine of Equity says,⁶¹ "that it is presumed that legal proceedings, during their continuance, are publicly known throughout the realm," further observing "that by 'realm' is meant 'the State or sovereignty where the property is,' and by the term 'the whole world' all men in that jurisdiction or State." Mr. Justice Story, in his work on Equity Jurisprudence, says: "Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner

⁵⁷ 199 Ill. 540.

⁵⁸ 3 Atk. 392. Vide Green v. White, 7 Bitchel, 242.

⁵⁹ Vide P. 108.

⁶⁰ 1 R. I. 112.

⁶¹ Vide 157.

as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit."⁵⁹

This theory of constructive notice and the presumption on which it is based has often been condemned. Thus Melville, J., in delivering the judgment of the Bombay High Court in *Krishnappa v. Bahiru*,⁶⁰ referring to it said: "We might well hesitate to regard as conclusive such presumption as is here referred to, or to carry the doctrine of *lis pendens* to such an extreme." The incorrectness, as a fact of the presumption is not denied, but it is usually attempted to justify it on the analogy of that of universal knowledge of law, and of that of *Caveat emptor*. Mr. Bennett admitting that "the application of the principle in practice, as well as the indulgence in the presumption that all men know the law, is attended with severity in special cases," adds "but where a hardship must exist, it is better that it should fall upon him who, by diligence and intelligent research, might have avoided it, and is, hence, responsible for it, than upon the general public, who must preserve their right, through legal proceedings in the courts."⁶¹ Some of the French jurists, even going beyond the doctrine of notice, have attempted to justify the application of the rule of *lis pendens* on the ground *que l'acquéreur d'un objet litigieux, faute d'être volontairement intervenu dans l'instance pendante entre son vendeur et un tiers, doit être présumé en état de dol, et comme tel, tenu d'en subir les conséquences quelles qu'elles soient*, though this presumption has been condemned as being opposed to general principles, *alors surtout que rien ne démontre que cet acquéreur ait eu connaissance de ce procès*.⁶² The doctrine of the constructive notice of *lis pendens* without regard to actual notice, is firmly established by repeated adjudications, both in England and the United States.

In this country, quite recently, in *Abboy v.* Sir Arthur Collins, C. J., and Wilkinson, J., said—"In order that third parties should be bound by the decree passed in the suit, it is, it appears to us, essential that they or that the parties through whom they claim should have had notice, for, as remarked by Sir Richard Couch, C. J., in *Kailas Chandra Ghose v. Fulchand*,⁶⁴ practically there is no substantial difference between *lis pendens* and having notice of the suit."

⁵⁹ 2nd Eng. Ed., 263.

⁶⁰ VIII B. H. C. R., A. C., 69.

⁶¹ Ben. Lis Pend., 82.

⁶² Lac. Chose Jugee, 287.

⁶³ I. L. R. XII Mad. 180.

⁶⁴ VIII B. L. R. 474.

272. Mr. Bennett himself points out, however, that the foundation for the doctrine of *lis pendens*

Doctrine of *lis pendens* maintained on account of necessity and public policy.

does not rest upon notice, actual or constructive, but solely upon necessity—the necessity that neither party to the litigation should alienate the property in dispute so as to affect his opponent,⁶⁵ . . . the necessity of the rule is inexorable tempered by little or no consideration of conscience, because a relaxation of the rule, to avoid harsh applications in special cases, would defeat the object of the rule itself.⁶⁶ Mr. Freeman observes that, “If during the pendency of any action at law or in equity the claim to the property in controversy could be transferred from the parties to the suit so as to pass to a third party, unaffected either by the prior proceedings or the subsequent result of the litigation, then all transactions in our courts of justice would, as against men of ordinary forethought, prove mere idle ceremonies. A series of alienations protracted into the boundless future would for ever preclude the prevailing party from obtaining that to which he had vindicated his claim.”⁶⁷ The same has been repeatedly laid down by the courts. Thus in *Murray v. Ballou*.⁶⁸ Chancellor Kent said: “I am bound to apply it and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice, but this seems to be one of the cases in which private mischief must yield to general convenience.” And in *Newman v. Chapman*,⁶⁹ the Supreme Court of Virginia said: “This necessity is so obvious that there was no occasion to resort to the presumption that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit, to justify the existence of the rule. In fact it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the suit issued and on the last moment of the day.” It was said in *Watson v. Wilson*⁷⁰ that: “It is a careless use of language which has led judges to speak of it (*lis pendens*) as notice, because it appears to have in some instances a similar effect with notice.” The Tennessee Supreme Court has recently observed in *Mann v. Roberts*,⁷¹ that the doctrine of *lis pendens* does not depend upon notice at all. In

Ben. Lis Pend. 78.

⁶⁶ Ben. Lis Pend. 68.

⁶⁷ Fr. Jud. 351.

⁶⁸ 1 Johns. Ch. 566.

⁶⁹ 14 Am. Dec. 766.

26 Am. Dec. 459.

11 La. 57.

Houston v. Timmerman,⁷² Lord, J., in delivering the judgment of Oregon Supreme Court said: "Chancellor Kent said, that a '*lis pendens* duly prosecuted, and not conclusive, is notice to a purchaser so as to affect and bind his interest by the decree.' Strictly speaking, however, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. . . . The main purpose of the rule is to keep the subject-matter of the litigation within the power of the Court until the judgment or decree shall be entered; otherwise, by successive alienations, its judgment or decree could be rendered abortive, and thus make it impossible for the Court to execute its judgments or decree. Hence the general proposition, that one who purchases of either party to the suit the subject-matter of the litigation after the court has acquired jurisdiction is bound by the judgment or decree, whether he purchased for a valuable consideration or not, and without any express or implied notice in point of fact, is sustained by many authorities, and disputed by none."⁷³ The rule of *lis pendens* is really founded on an absolute public policy, for otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation.⁷⁴ In *Brightman v. Brightman*,⁷⁵ the Rhode Island Supreme Court said: "This rule has been adopted from motives of public policy. Without it, the effect of every judgment and decree might be avoided by a mere transfer of the defendant's title, as a decree of judgment was about to be passed against him. A party might always be in pursuit of his rights without being able to overtake them."⁷⁶ In England, in *Bellamy v. Sabine*,⁷⁷ Lord Chancellor Cranworth said: "It is scarcely correct to speak of *lis pendens* as affecting the purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party. . . . The necessities of mankind require that the decision of the Court shall be binding, not only on the litigating parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice of pending proceedings. If this were not so, there could

⁷² 11 Am. St. Rep. 848.⁷³ *Eyster v. Gaff*, 91 U.S. 521;*Grant v. Bennett*, 96 Ill. 513;*Randall v. Lowe*, 98 Ind. 281;*Daniels v. Henderson*, 49 Cal. 242;*Blanchard v. Ware*, 48 Iowa*Carr v. Lewis*, 15 Mo. App. 551*Currie v. Fowler*, 5 J. J. Mars⁷⁴ Story's Eq. Jur. (2nd Ed.) § 6⁷⁵ 1 R. I. 112.⁷⁶ 2 Wins. 24.⁷⁷ 1 De G. and J. 566.

be no certainty that litigation would ever come to an end." In that same case, Turner, L. J., speaking of the doctrine said, "It is a doctrine common to the courts both of law and equity, and rests, I apprehend, upon this foundation, that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were allowed to prevail. The plaintiff would be liable to be defeated in every case by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

This has been quoted with approval in a number of cases even in this country.⁷⁸ Citing that case, Kernan and Kindersley J. J., said in *Manual Fruval v. Sanagapalli*⁷⁹ that "the doctrine of *lis pendens* does not depend upon notice, but upon the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding, not only on the litigant parties, but on those who derive title from them *pendente lite*, whether there is notice or not." Quoting that same case with approval in *Brahannayaki v. Krishna*,⁸⁰ Muttusami Ayyar, J., said: "The true rule as to *lis pendens* does not rest either on implied notice of everything deducible from, or appearing in, the suit, or on the constructive extension of parties so as to warrant the purchaser *pendente lite* being treated as if he was a party to the suit in every respect. But it consists, as stated in *Bellamy v. Sabine*, in that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent." The Bombay High Court in *Gulabchand v. Dhondi*⁸¹ broadly said that for the application of the doctrine of *lis pendens* it was immaterial whether the alienee *pendente lite* had notice of the suit or not.

273. On general principles of expediency and equity, the doctrine of *lis pendens* has long been recognized in India. It was not formally enacted in this country prior to 1882, but it received recognition in Sec. 223 of the Civil Procedure Code of 1859, which provided that "if the decree be for a house, land, or other immovable property in the occupancy of a defendant or some person on his behalf, or of some person claiming under a title created by the defendant subsequently to the institution of the suit, the court shall order

⁷⁸ Raj Kishen Mookerjee v. Radha Madhub Hol-
dar, XXI W. R. 349.
v. Dasrat, I. L. R. VI Bom. 173.

⁷⁹ VII M. H. C. R. 111.

⁸⁰ I. L. R. IX Mad. 96.

⁸¹ XI B. H. C. R. 64.

delivery thereof to be made by putting the party to whom the house, land, or other immovable property may have been adjudged." The Bombay High Court in *Krishnappa v. Bahira*⁸² said, however, that on reading that section with Sec. 230 of the Code, "It would seem reasonable to infer that the person so removed might, under certain circumstances, be reinstated in possession. The effect of the two sections taken together would seem to be that an alienation of property *pendente lite* is *prima facie* fraudulent, but that if the alienee could show that he was a *bonâ fide* purchaser for valuable consideration without notice, or that in any other way he had an equity superior to that of the plaintiff in the suit, he might recover the property from which he had been in the first instance summarily removed."

The courts here, however, acted upon the doctrine quite apart from, and independent of, the Civil Procedure Code on the analogy of the English cases, and to the extent it was recognized by the English Courts. Thus Mr. Justice Holloway, in his judgment in *Tranquebar v. Nathambedu*,⁸³ said: "The doctrine of *lis pendens* is, simply, that parties bound by the litigation cannot alter the object of it so as to withdraw it from the decree made in the suit. It by no means implies that, upon the instant of a question being raised, the parties are compelled to quiescence until its determination. So far is this from being the case, that, unless the question involved in the litigation will, when decided in a particular manner, render a title insecure, *lis pendens* is not even an answer to a bill for specific performance."⁸⁴ In *Manual Fruval v. Sanagapalli*,⁸⁵ Kernan and Kindersley, JJ., referring to some of the earlier decisions of the court said, that "the doctrine of *lis pendens* no doubt applies to this country." In *Gulabchand v. Dhondi*,⁸⁶ it was observed that a mortgage made pending a suit by a prior mortgagee for the sale of the mortgaged property was void. So also Sir Michael Westropp, C. J., in delivering the judgment of a Full Bench of the Bombay High Court in *Lakshmandas v. Dasrat*,⁸⁷ said: "As observed in *Balaji v. Khushalji*,⁸⁸ and other cases there cited, the doctrine of *lis pendens* is in force in British India." The rule, as now enacted for British India, is contained in Sec. 52 of the Transfer of Property Act, 1882, which provides that "during the active prosecution in any court having authority in British India, or established beyond the limits

⁸² VIII B. H. C. R. 59.

⁸³ VI M. H. C. R. 238.

⁸⁴ Bull. & Hutchins, 32 Beav. 616.

⁸⁵ VII M. H. C. R. 111.

⁸⁶ XI B. H. C. R. 64.

⁸⁷ I. L. R. VI Bom. 172.

⁸⁸ XI B. H. C. R. 34.

of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose." This rule so far it goes is quite in accordance with that recognized in England and the United States.

274. The very first essential for the application of the rule in British India, as well as elsewhere, is that there should be a contentious suit or proceeding, and that the alienation should be made in the active prosecution thereof. A suit is not contentious within the meaning of the rule, until after the summons is served on the defendant; and the rule of *lis pendens* will not apply where the transfer has been made after the institution of the suit, but before the service of the summons.⁸⁹ The Madras High Court has held the same in *Abboy v. Annamalai*,⁹⁰ to a great extent on the ground of the necessity of notice, on which the doctrine of *lis pendens* was in the earlier cases considered as based. In *Pranjivan v. Bajju*,⁹¹ the parties referred their disputes to arbitration, and the award was filed in court by the plaintiff under Sec. 327 of the Civil Procedure Code of 1859; and the Bombay High Court held that the presentation of the award was equivalent, at the very least, to the presentation of a plaint, and the "proceedings consequent thereon constituted a *lis pendens*, during which a mere money decree-holder could not, by any proceedings which he might take, defeat the object of the plaintiff's application to the court."

This is the general rule elsewhere also. In the United States, except where, as in some of the States, the contrary is enacted, there is no *lis pendens*, so as to give constructive notice to strangers, until a summons has been served, and a complaint, distinctly stating the subject of the litigation, and specifying the claim made, has been filed.⁹² It was thus held

⁸⁹ *Radhasayam v. Sibn*, I. L. R. XV Cal. 647.

⁹⁰ I. L. R. XII Mad. 180.

⁹¹ I. L. R. IV Bom. 34.

⁹² *Leitch v. Wells*, 48 N. Y. 611.

Dawson v. Mead, 71 Wis. 295.

in *Roberts v. Jackson*,⁹⁵ that a purchase upon a judgment which became a lien upon the property subsequently involved in a chancery suit prior to the service of the *subpœna*, was not a *pendente lite* purchase. It is, however, not, where considered necessary, to the binding of the plaintiff's vendee that at the time of the transfer the defendant should have disclosed his defence or his claim to affirmative relief.⁹⁶ Even in the States in which it is enacted that the suit will be considered pending from the date of the filing of the petition, the mere handing of it to the clerk and his endorsement thereon is not considered a sufficient filing. Thus in *Wilkinson v. Elliott*,⁹⁷ Johnston, J., in delivering the judgment of the Kansas Supreme Court, said: "Before the doctrine of *lis pendens* will apply, the petition should be actually filed and made a permanent record, with the *bonâ fide* intention of proceeding with the prosecution of the action, and it should be kept on record open to inspection by the whole world. . . . When the plaintiff handed her petition temporarily to the clerk, she did not ask for nor obtain the issuance of a summons,—an essential step to the institution of an action. It was apparently the intention that the acts and purposes of the plaintiff should be concealed from all until the petition was finally returned and deposited with the clerk to be kept by him as a permanent record. It is our opinion that until the petition was permanently placed on record, with the *bonâ fide* purpose of diligently proceeding with the litigation, the action cannot be regarded as pending."

And for the purposes of the rule the constructive service of process, when authorized by law, is equivalent to its personal service. Whenever the service may be made by publication, *lis pendens* is complete upon the actual publication of the notice for defendant to appear,⁹⁸ but there is no *lis pendens* until the order for publication is fully executed.⁹⁷ If the service of a process is set aside as defective, *lis pendens* will not begin till the amended process is served.⁹⁸ In a suit brought against a partner by creditors to reach the partnership assets, the service of summons even on one of the partners will create a *lis pendens*, so that intermeddlers with the partnership assets will be bound by the decree that may be given in the case.⁹⁹ Where there are several defen-

⁹⁵ 1 Wend. 456.

⁹⁶ Hull L. C. v. Gustin, 54 Mich. 624.

⁹⁷ 19 Am. St. Rep. 158.

⁹⁸ Chaudron v. Magee, 8 Ala. 570.

⁹⁹ v. Williams, 5 Ohio. 461.

⁹⁷ *on v. Bucklin*, 9 Page

⁹⁷ Carter v. Mills, 30 Mo. 432.

Cassidy v. Kluge

⁹⁸ Allen v. Case, 13

⁹⁹ Dreyer v. Wood, 15 Kans. 344

dants in a suit, on whom process is served actually or by publication at different times, *lis pendens* will commence against each of them at the time of the service on him, even though this may lead to great perplexity in practice.¹⁰⁰

It appears also to be settled that if amendments are made to the plaint and new matters brought in by the amendments, there will be no *lis pendens* as to those matters prior to the amendments, though every such amendment may create a new *lis pendens*.¹ Thus Mr. Bennet says, "When the original bill or petition does not involve the property, but pending the suit an amendment or amended petition or bill is filed alleging new matter, and involving property not before in litigation, the *lis pendens* created by the amendment will commence from the filing of the amendment or amended pleading and will not relate back to the commencement of the action so as to affect intervening rights."² On the same principle "where property was sought to be subjected to the payment of plaintiffs' demands upon one ground, and that ground becoming untenable, the bill was amended to show another equity, upon which plaintiffs prevailed in the suit, a purchaser preceding the amendment was held not to be bound by the decree."³

275. There is a conflict also as to when a suit may be said to terminate. Sugden in his Work on Vendors and Purchasers says that *lis pendens* is not terminated when the decree does not put an end to the suit. In *Higgins v. Shaw*,⁴ Lord Leonard said that "a decree for account does not put an end to a suit; it is a continuance of the litigation." In *Kinsman v. Kinsman*,⁵ Lord Lyndhurst, after observing that "In order that there may be a *litis pendentia* there must be a continuance of *litis contestatio*," referred by way of illustration to the "case of a decree for an account in an administration or creditors' suit;" and said, "He was ready to admit that a decree for an account in a creditors' suit would not determine a *lis pendens*. But when the proceedings went a great deal further than the account: . . . when everything had been obtained under the decree which the suit had contemplated, and nothing remained but to carry the decree into effect, the case was most

Ben. Lis. Pend. 108, 109.

¹ Oromwell v. Clay, 1 Dana.

Kennedy v. Adams, 11 B. Men. 106.

² Ben. Lis. Pend. 97.

³ Stone v. Connelly, 71 Am. Dec. 499.

Wortham v. Boyd, 66 Tex. 401.

⁴ 2 Dr. & War. 361.

⁵ 1 Russ. and M.

materially changed. After the decree, and before execution, it was not pretended that *lis pendens* could any longer exist. It might be true that no general decree had been made upon the cause coming back for further directions. And why was it so? In all probability because no further directions were required; the rights of the parties having been ascertained and decided by the report, that report confirmed, and still unappealed from, was in truth the final judgment in the case. How many years had elapsed that that decree had been pronounced? Upwards of a quarter of a century; and matters might have gone for a century longer because nobody had any motive to interfere. If the supplemental bill were considered as growing out of the former suit, that might, in a certain sense, be held to be a continuance and prosecution of the original cause; but it would be an abuse of the plain meaning of the term *lis pendens* to apply it to a case like the present, where the supplemental bill was not filed till after the sale had taken place."

Sir Charles Sargent, in delivering the judgment of the Bombay High Court in *Venkatesh v. Muruti*,⁶ after referring to the above cases said: "Here, however, the decree was a final one; the litigation between the parties, which had for its subject the liability of other property than what was contained in the mortgage-bond for the payment of the mortgage, was terminated by the decree, which only remained to be executed against that property. In other words, the *litis contestatio* had ceased. The cases cited for the plaintiff are not in point. In the Privy Council decision in *Bazayet Hossein v. Dooli Chund*,⁷ it is not plain whether the mortgage-bond was executed after the decree in the suit instituted by the widow Tayyuban; but, assuming it to have been so, the decree directed an account to be taken, which brings it within the class of cases above mentioned. In *Ranji Narayan v. Krishnaji Lakshman*⁸ the plaintiff purchased under a common money-decree, and, therefore, subject to the previous mortgage and decree, and the question whether there was *litis pendentia* after decree did not arise."

Mr. Bennett says,⁹ "Although it is true, in a general sense, that *lis pendens* ceases with the rendition of judgment or entry of final decree, yet, in the case of a foreclosure of a mortgage on real estate, it cannot be said that *lis pendens*

⁶ 1. L. R. XII Bom. 220.
⁷ 1. L. R. IV Cal. 409.

⁸ XI B. H. O. R. 139.
⁹ Ben. Lis. Pend. 120.

ceases upon the making of the master's deed after sale under the decree. Where something remains to be done by the court, in the execution of its judgments and decrees, other than can be done without order of court, by the merely ministerial officers of the court, *lis pendens* continues until the decree is executed. So, in the case of the foreclosure of a mortgage, it continues until the purchaser has been put into possession of the property." The decree or judgment must be final, that is, "of such a character as puts a conclusion to the matters in question in the suit. Interlocutory decrees or orders cannot have that effect, although they may purport to settle the rights of the parties. The court, however, still would have power to modify or vacate them, and for all purposes of notice or binding force, *lis pendens* will continue, notwithstanding such orders or decrees. The principal ground upon which this rule is based, so far as relates to the rights or interests of third parties, is, that the public have cognizance of what is taking place in courts of record, within their jurisdictions. When, therefore, the court ceases to act in a cause, the reasons requiring vigilance cease to exist."¹⁰

276. If a suit abates and is revived within a reasonable time, there will be no suspension of *lis pendens*.¹¹ Nor is the effect of the former suit as *lis pendens* impaired by the dismissal of a suit with liberty to proceed *de novo*, and by the immediate filing of his suit *de novo* the plaintiff will be considered constant and continuous in his prosecution.¹²

If a suit is discontinued or dismissed for want of prosecution, and a new suit brought again, a purchaser pending the first suit will of course not be affected by the decision in the subsequent suit.¹³ And it appears also to be generally agreed upon that where the suit is dismissed and afterwards reinstituted, the doctrine of *lis pendens* is not applicable to one who purchases after the dismissal and before the revival of the suit.¹⁴ Thus in *Trentor v. Pothen*,¹⁵ Mitchell, J., delivering the judgment of the Minnesota Supreme Court, said, that "nothing can be claimed from the notice of *lis pendens*, filed in a former suit, which was dismissed before plaintiff purchased."

¹⁰ Ben. Lis. Pend. 124.

¹¹ Trimble v. Boothby, 45 Am. Dec. 526.

¹² Ferrier v. Buzick, 6 Iowa, 238.

¹³ Watson v. Wilson, 26 Am. Dec. 459.

Herrington v. Herrington, 27 Mo.

Preston v. Tubbin, 1 Vern. 286.

Blake v. Hayward, 1 Bayley. Eq. 208.

Price v. White, 1 Bayley. Eq. 234.

Turner v. Crebil, 1 Ohio, 174.

24 Am. St. Rep. 225.

There is a conflict of opinion, however, as to the case of a purchase made in such a case before the dismissal. Mr. Bennett says:¹⁶ "Where a cause is dismissed after a purchase is made *pendente lite*, and the suit is again reinstated, it will depend upon the terms of the dismissing order and the circumstances of the case, whether the *lis pendens* will be restored and the purchaser be bound by the judgment or decree. If the dismissing order is absolute and unconditional, the title will vest and the *lis pendens* be destroyed; but if the dismissing order is with leave to restore within a time limited, and the restoration takes place, or is without prejudice, or with general leave to reinstate, and the case is reinstated within a reasonable time, the *lis pendens* is preserved."¹⁷ It is said that even where a bill in chancery is dismissed without prejudice and reinstated, it is a question, upon which authority may be found on both sides, whether a purchaser of the subject-matter in litigation, after the dismissal but before the case is re-instated, will take *pendente lite*.¹⁸ The weight of authority, however, appears to be in favor of the view that, if the dismissal is with leave to re-instate within a time limited, and the case is re-instated within the time, there should be a *lis pendens*; but if the order of dismissal is silent as to the right to re-instate, the better opinion appears to be that there is no *lis pendens*. This should certainly be so after the lapse of the period within which the court would have power or the party a right to have the cause re-instated, and especially if the rights of third parties had intervened.¹⁹ In *Clarkson v. Morgan*,²⁰ the doctrine that a purchaser pending a suit dismissed without prejudice is bound by the subsequent suit was expressly denied.

In some countries there are special laws providing for defendants, not personally served with process, appearing and opening judgments and decrees upon particular terms, and the weight of authority is in favor of the position that judgments and decrees rendered under statutes upon constructive notice are final and unconditional, and sales made under such judgments to *bonâ fide* purchasers without notice are valid, notwithstanding the provisions of those special laws.²¹ In *Scudder v. Sargent*,²² a notice was served upon the plaintiff of a motion to admit the defendant to defend under

¹⁶ Ben. Lis Pend. 186.

¹⁷ *Ferrier v. Buzick*, 6 Iowa, 258;

¹⁸ Ben. Lis Pend. 221.

Harrington v. McColum, 73 Ill. 488.

¹⁹ Ben. Lis Pend. 222.

²⁰ 6 B. Mon. 441.

²¹ Ben. Lis Pend. 296.

²² 15 Neb. 108.

such a law ; but before any order was made, the property in dispute was conveyed by a party who had acquired title under the judgment to a purchaser in good faith, and without notice of the proposed motion, and it was held that the mere notice of the motion did not constitute a *lis pendens*, and the grantee acquired a valid title ; as the *lis pendens* of the former suit had ceased upon the rendition of the judgment, and a new one would not commence until the court in pursuance of the notice made an order granting leave to defend. In Ohio, the contrary was held in *Stoddard v. Myers*,²³ and the Supreme Court said :—"It is assumed that when the right to recover in the bill in equity was taken away by the reversal of the judgment, the suit ceased to be pending, so far as to bind the property. We are not satisfied that this position is a sound one. No such distinction is to be found in the books. But the doctrine seems plain that by the institution of a suit the subject of litigation is placed beyond the powers of the parties to it ; that whilst the suit continues in court, it holds the property to respond to the final judgment or decree. The supplemental bill was ingrafted into the original bill and becomes identified with it. The whole was a *lis pendens*, effectually preventing an intermediate alienation." This was affirmed in *Gibbon v. Dougherty*,²⁴ on the ground that the substantial object of the suit was at all times the same ; and that the reversal of the judgment for an irregularity was neither an extinguishment nor a release of plaintiff's rights.

277. In case of an appeal from a judgment, the *lis pendens* of the suit is continued and held in force.²⁵ Where a right of appeal is given, it seems essential to the efficient exercise of the right, that purchasers should be regarded as acquiring their interests subject to the contingency of the diminution or loss by subsequent reversal of the judgment, and therefore that they must be held to be purchasers *pendente lite*, if their purchase was made at any time after the decision of the suit.²⁶

In British India the doctrine of *lis pendens* has been held to apply to a transfer pending the suit in the original court, even if the decision of that court is in favor of the

²³ 8 Ohio, 303.

²⁴ 10 Ohio, 363.

²⁵ Washburne v. Steenwick, 33 Minn. 327.

²⁶ Carr v. Cates, 96 Mo. 371.

Smith v. Brittenham, 109 Ill. 540.

Dunnington v. Elston, 101 Ind. 373.

transferor's right, and the opposite party succeeds on an appeal to which the transferee is not made a party. This was held in *Gobind Chunder v. Guru Churn*,²⁷ in which Ghose, J., observed in the judgment of the Court, that "the proceedings in the Appellate Court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favor of the present plaintiff's predecessor in title, yet that was a decree which was open to appeal, and the decree having been appealed against, we ought to take it that the decree of the Appellate Court was the decree in the suit, and the sale at which the plaintiff purchased having taken place pending the suit in which that decree was pronounced, we think that the doctrine of *lis pendens* does apply to the case." In *Radhika v. Radhamani*,²⁸ it was held that a decree-holder's power over the property decreed to him during his interim enjoyment, must be taken to be subject to the result of the final appeal, except as to yearly leases and such other acts, as are either the necessary or the ordinary and reasonable incidents of an interim beneficial enjoyment; and the grant of a permanent lease would not be such an incident.

278. The case of a bill for review or of error has been distinguished from that of an appeal. It has been said, that "a writ of error is a new and original suit. Original process issues in it, and must be served to bring the adverse party into court.

The relative character of the parties is changed, new pleadings are made up, and a final judgment upon it, though it may operate on another cause, is, nevertheless, a termination of the new suit, of process in error." Proceedings on a writ of error have often been held to be not a continuance of the original suit, the judgment in which it is brought to reverse, but a new suit not to be considered pending before the service of the citation, so as to affect strangers as a *lis pendens*. On this principle, it has often been held that a conveyance by a decree-holder of the lands decreed to him and placed in his possession, will pass a title not liable to be divested by a writ of error, unless the proceedings upon such writ were commenced and citation served on

²⁷ I. L. R. XV Cal. 94.| ²⁸ I. L. R. VII Mad. 94.

the defendant in error prior to his conveyance.²⁹ A new *lis pendens* is created by the writ, but it does not relate back to the time of the rendition of the original judgment or decree. Thus in *Ludlow's Heirs v. Kidd's Ex'rs.*,³⁰ a suit by infants was dismissed on final hearing, but the decree of dismissal was reversed on review. A purchase of the property in dispute in the suit was made after the dismissal of the suit and before the bill of review was filed, and the purchase was held not to be *pendente lite*. The court said: "A decree which puts an end to the suit has not heretofore been considered less final, because it was subject within a limited time to be reviewed upon a bill of review. The argument for complainants is that the statute giving the infants a day after they come of age to file a bill of review is to be taken as part of the decree itself, and considered as if the privilege was contained on its face and that the legal effect thereof is that it remains a matter *pendente lite* until the rights reserved by the decree are extinguished. I do not consider it at all important to determine in this case whether the statute is to be so blended with the decree. If the decree had in terms reserved to the complainants the right to shewing cause against it after they arrived at age, it would not have had the effect of continuing the cause until that period. . . . Nothing is reserved or left for further determination by the court, but the whole controversy between parties is disposed of and a final end put to that particular cause ; and I cannot perceive that the decree being against infants, at all changes its character or alters its effect as to third persons." In *Pierce v. Stinde*,³¹ their Lordships of the Privy Council said: "It is clear that when a sale of land is made between the date of final judgment affecting the land and the date when the proceeding in error is commenced to reverse that judgment, it is not subject to a *lis pendens*, and the purchaser will get a good title by the purchase, notwithstanding the circumstance that the judgment is afterwards reversed in the proceeding under the writ of error."³²

Authorities are not wanting, however, even for the contrary view,³³ that a purchase after judgment and

²⁹ *McCormick v. McClure*, 39 Am. Dec. 441.
Taylor v. Boyd, 17 Am. Dec. 603.
Woodrige v. Boyd, 18 Lea. 151.
³⁰ 3 Ohio, 441.
³¹ 11 Mo. Ap. 364.

³² *Clarkson v. Morgans*, 1 Dev. 6 B. Mon. 441.
³³ *Clarey v. Marshall's Heirs*, 4 Dana, 96.
Earle v. Crouch, 3 Met. 450.
Gore v. Stackpole, 1 Dow. 81.

before writ of error is *pendente lite* purchase. Thus a party purchasing land from a person who had obtained a conveyance of the land from a commissioner appointed by the court for that purpose is liable to have his title divested, if the decree should be set aside by bill of review filed after the purchase,³⁴ and subject to *lis pendens*. In *Miller v. Hall*³⁵ it is said that the theory of sales of real estate, made under the orders and judgment of courts, is that the court itself is vendor, and that the commissioner or master is the mere agent of the court in executing its will; that therefore the purchaser from a party who obtained his title by a decree which had been reversed, was a *pendente lite* purchaser, and stood no better than such vendor whose title was destroyed by the reversal." The question was discussed at length in *Cheever v. Minton*,³⁶ in which Helm, C. J., in delivering the judgment of the Colorado Supreme Court said: "The Supreme Court of Kentucky holds that since the right to a writ of error exists by virtue of the statute, and the purchaser must be presumed to know the law, he takes subject to every possible effect which proceedings on error may have upon the title of his grantor. It is said that the statute which allows a certain time for suing out writs of error becomes a part of the decree itself, and thus qualifies or limits the title of those purchasing at private sale thereunder. On the other hand, courts of no less dignity assert that the final decree, where no appeal is taken therefrom, is a final determination of the particular suit. Also, that subsequent proceedings by writ of error constitute a wholly new and independent action. Therefore they say, as we think correctly, that during the interval between final judgment and proceedings on error there is no suit pending, and a purchaser does not take title *pendente lite*. Hence, to such a purchaser, if his purchase be otherwise *bonâ fide*, the subsequent reversal or affirmance of the decree or judgment is a matter of no consequence.³⁷ The three decisions last above mentioned³⁸ were rendered in causes where the decrees relied upon dismissed the respective bills and adjudged the costs against complainants. Some writers undertake to distinguish between cases of this kind and cases

³⁴ *Debell v. Foxworthy*, 9 B. Mon. 228.
³⁵ *Clark's Heirs v. Farrow*, 52 Am. Dec. 552.
³⁶ 1 Bush. 229.
³⁷ 13 Am. St. Rep. 258.

Barlow v. Stanford, 82 Ill.
Wadhams v. Gay, 78 Ill. 415;
Eldridge v. Walker, 80 Ill. 270;
Heirs of Ludhow v. Kidd, 8 Ohio, 541.

where the action, whether at law or in equity, is tried on its merits, and a final decree or judgment is entered in favor of plaintiff, from whom the title in controversy is obtained by private purchase. It cannot be denied that plausible reasons are advanced in support of this distinction; but, in our judgment, the sounder view is otherwise. The distinction is inconsistent with the conclusion adhered to in this and other states, that the writ of error constitutes a new and independent suit. Moreover, the judgment or decree in one instance is as final and complete as in the other, and the writ of error lies to review each alike. Under these circumstances, it is certainly illogical to say that if the action be dismissed, the suit is no longer pending, though a writ of error subsequently issue; while, if judgment be entered on the merits, and afterwards the cause is reviewed upon error, an intermediate purchase is *pendente lite*. Nor is the foregoing distinction, so far as we can discover, expressly made in any of the decisions we have cited. The cases in 82 Illinois, 6 Blackford, and 3 Ohio, 337, were decided with reference to adjudications on the merits, and not dismissals; and in the three remaining opinions, the matter is passed by unnoticed."

279. The rule often presses with undue hardship against a *bona fide* purchaser without notice; and it is therefore considered essential to the application of the rule, that to affect alienees *pendente lite* there must be a close and continuous prosecution of the suit, the exercise of a reasonable diligence unaccompanied with "any gross steps or irregularities by which injury could accrue to the rights of third parties,"³⁹ and also that the prosecution must not be conclusive."⁴⁰ Both the English and the American authorities⁴¹ in support of the view are collected in *Hayes v. Nourse*,⁴² in which Follett, C. J., in delivering the judgment of the New York Supreme Court said: "The rule that a purchaser, *pendente lite*, of the subject of the litigation, if he buys in good faith, and without actual notice of the claims of the litigants, is

³⁹ *Durand v. Lord*, 115 Ill. 610.

Trimble v. Boothby, 45 Am. Dec. 536.

⁴⁰ *Rippetoe v. Dwyer*, 22 Am. Rep. 370.

⁴¹ Vide, *Preston v. Tubbin*, 1 Vern. 286.

Sorrell v. Carpenter, 2 P. Wms. 482.

Murray v. Balton, 1 Johns. Ch. 566.

Hayden v. Bucklin, 9 Paige, 512.

Myrick v. Selden, 36 Barb. 15.

Herrington v. McCollum, 73 Ill. 476.

Ashley v. Cunningham, 16 Ark. 168.

Bybee v. Summers, 4 Or. 364.

11 Am. St. Rep. 700.

not affected by the suit pending, or by the notice of its pendency, unless the suit has been prosecuted with due diligence, was first formulated by Lord Bacon, who in his enunciation of the rule laid stress on its application only when the transfer should be made while the suit was in full prosecution, and without intermission." This, no doubt, as observed by Mr. Bennett,⁴⁵ "does not mean that the suit must be brought to a close within any limited time, or that steps shall be taken in the course of the prosecution of the cause within any limited period. Such a construction of the rule would be disastrous to the rights of litigants, and would tend to the defeat of justice." It evidently means a constant prosecution, a prosecution of the suit without such negligent intermission, as may be shewn to be inexcusable or as shall not be satisfactorily explained. Lord Nottingham in an early case held that "full prosecution existed so long as the cause continued to pend, and the court continued to have complete jurisdiction over the *res* and person, and expressed it as his opinion that the only real ground for destroying *lis pendens* was an intermission in a cause for an undue period without any reasonable excuse." In *Kinsman v. Kinsman*,⁴⁶ Lord Lyndhurst said: "Without going so far as to say with Lord Bacon that there must be a constant and vigorous prosecution of the suit, still something must be done to keep it alive and in activity." "The suit," says⁴⁵ Mr. Herman, "must be prosecuted to a final determination without unnecessary delay. It must not be commenced and continued from term to term at the will of the parties, and after years of delay then disposed of. Negligence in its prosecution will terminate the protection afforded by the notice."⁴⁶ In *Hames v. Orr*,⁴⁷ it was said that "one who claims the benefit of *lis pendens* against a *bond fide* purchaser, must show that the suit was prosecuted with some diligence, and that there was no unreasonable delay."⁴⁸ In *Ferrier v. Buzick*,⁴⁹ it was said that "a suit must be duly, constantly and continuously prosecuted in order that it may be treated as a *lis pendens*."

However, while a *lis pendens* may be lost by neglect in prosecution, a reasonable excuse for the delay can keep

⁴⁵ 1 R. & W. 11.

⁴⁶ 11 R. & W. 11.

⁴⁷ Fox v. Renfer, 25 Ohio, 141.

⁴⁸ Wickliffe v. Breckenridge 1 B.

⁴⁹ 10 R. & W. 26.

it in life. A question of the reasonableness of delay in any case will, to a great extent, depend on the circumstances of that case. And in *Ehrman v. Kendrick*,⁵⁰ a failure for four years to prosecute the mechanic's lien claim, without an excuse for the delay, was held to be such gross negligence as to deprive the lien of its right of enforcement against a person who took a mortgage pending the suit. "In *Petree v. Bill*⁵¹ a delay of two years without a step taken in the case, or a motion made indicating an intention to prosecute the suit was in the absence of any excuse or satisfactory reason for the delay, held to be such gross and culpable negligence as to destroy the force of *lis pendens*. In *Mann v. Roberts*⁵² the *lis pendens* created by filing papers for condemnation in the Circuit Court and the order of condemnation was held to be lost by the failure to prosecute for nearly five years, it being observed that there must be a close and continuous prosecution, but that the advantage of the rule will be lost only by unusual and unreasonable delay, which may not be explained.

In *Venkatesh v. Maruti*⁵³ Sir Charles Sargent, C. J., in delivering the judgment of the Bombay High Court said: "There is in the present case the further circumstance that nothing was done in the suit after the decree and during the seven years which elapsed between it and the date of defendant's purchase in 1876. . . . The suit in which the decree of 1869 was passed cannot, therefore, in our opinion, affect the defendant's title as a *lis pendens*. The defendant was a purchaser for value without notice of the plaintiff's decree, which created the lien on the land from Apaya, who was in possession at the time, and he, therefore, takes unaffected by the plaintiff's equitable lien created by the decree." In *Wickliff's Heirs v. Breckenridge's Heirs*,⁵⁴ even a delay of more than forty-seven years was considered sufficiently excused by the fact of the successive deaths of parties and the necessary substitution for them of their representatives. It was, however, observed in that case that it was not necessary that the prosecution should be "with even ordinary diligence." Even in England, in *Hunter v. Earl of Hope-ton*,⁵⁵ the suit had remained dormant for eighteen years,

⁵⁰ 1 Met. 149.
⁵¹ 2 Bush. 62.
⁵² 11 Lam. 57.

VII D. 111
⁵⁵ 4 Macq. 972..

and Lord Chancellor Westbury said: "This action never has been disposed of, no further step having been taken since the defence was lodged. It has been asleep since 1847, but it is still *lis pendens*."

It has even been broadly maintained that though the court taking cognizance of a suit may, for negligence in prosecution, order a discontinuance of the proceedings in it, still it has power to allow them to remain pending for any length of time, and the judgment cannot be collaterally attacked by a *pendente lite* alienee on the ground of delay or negligence in prosecution. Thus Mr. Bennett says: "After the *lis pendens* has attached, and the *litis contestatio* is established, however great the delay in prosecution may be, the discontinuance of the cause must be left to the discretion of the court. So long as the court, in the exercise of its sound discretion retains the case, the *lis pendens* ought to be held valid. If, however, by reason of the plaintiff's neglect to prosecute, the court shall lose its power over the cause, it will be otherwise. To hold to the contrary would vest the court with discretionary power which would be perilous to the rights of litigants. When the elements of a valid *lis pendens* exist, and the court in the enforcement of its acknowledged jurisdictional power shall proceed to judgment or decree and its execution, if it were permissible for the same or another court in a collateral proceeding to say that there had not been a valid *lis pendens* binding upon the *res*, it would amount to the nullification of a judgment or decree where the court had acknowledged jurisdiction. Such a result would be most disastrous and ought never to occur."⁵⁶ The advocates of this view justify the application of *lis pendens* on the ground of estopped only. Mr. Bennett says: "It seems to me that in order to invalidate *lis pendens* the negligence must be so great, and the circumstances such, that a court can say that a party who is deprived of the force of *lis pendens* ought to be estopped by reason of the circumstances of the case. Those facts and circumstances ought to be such that a court can say, having in mind that Lord Bacon's rule required a full prosecution, that persons complaining have been misled and induced to act in such manner that those causing such acts

should be bound by estoppel.⁵⁷ Thus the true ground for decision, in collateral proceedings, in determining as to whether a *lis pendens* which has been pursued to judgment or decree is or is not invalid, is whether or not under all the circumstances of the case, the prosecution has been attended with such negligence as to have fraudulently induced third persons to believe that the prosecution has been abandoned or will be abandoned, and to have authorized them, in good faith, to deal with the property, or has induced to such an assumption of a relation to the *res*, that it is more equitable that one who has acted with such fraudulent negligence should suffer than that the *pendente lite* purchaser should be deprived of his purchase. It ought always to require a strong case thus to annul a *lis pendens*.⁵⁸ It is evident, however, that this is not the true ground of avoiding the application of the rule of *lis pendens*, on the ground of delay, but the active prosecution of the suit is, in the interests of *bond fide* purchasers for value, an essential part of the rule, and though of course mere little delay will not avoid its effect, every delay indicating an intermission or *pro tem* discontinuance of the suit will not fail to have that effect.

280. It is the very essential of the rule of *lis pendens* that

Lis pendens does not affect rights acquired before the commencement of the suit.

it will not apply to an alienation made before the commencement of the suit. It appears to be generally agreed upon that if a right is acquired before the suit, it will not be affected by *lis pendens*,

even though it may be perfected and paid for while the suit is pending. The rule is held to apply even if an equitable right has been acquired before the suit, and it ripens into a legal title after its commencement. Thus Mr. Bennett says: "Where a party has acquired an equitable title to property by contract entered into *bond fide* and without notice before suit, he will be protected, although he may acquire and perfect the legal title subsequent to the commencement of *lis pendens*."⁵⁹ . . . If the contract had been recorded prior to the commencement of the suit, his right would have been perfected or established before the suit took effect upon the property, so that he might subsequently require his vendor,

⁵⁷ Ben. Lis Pend. 178.
⁵⁸ Ben. Lis Pend. 184.

| ⁵⁹ Ben. Lis Pend. 277.

notwithstanding the suit, to comply with the contract and vest in him the legal title, and so would be a *bond fide* purchaser for value and without notice. Thus numerous examples might be given illustrative of this proposition. If the claimant as against the whole world had, at the time *lis pendens* became effective as to him, acquired an equitable right to the subject-matter of litigation, so that, as against the defendant, he could enforce in the courts a legal title to the property, or if such legal title had vested in him *bond fide*, and without notice of the pending suit before, as against strangers, the suit became effective upon the property, he would fall within the class of *ante litem* claimants; but, on the other hand, if such equitable right or legal title was not acquired or perfected as against the public, until after the suit had become effective upon the property, he would be a *pendente lite* purchaser, and become subject to the judgment or decree finally to be entered in the pending case.”⁶⁰ In *Parks v. Jackson*,⁶¹ the defendants had made contracts to purchase certain lands and entered into possession of them, and held and improved them for several years. A suit was then commenced against their vendor, during the pendency of which they, without any actual notice, completed their payments and procured conveyances, and they were held not to be bound by the decree rendered against him; as it would be unreasonable to compel the tenant in possession of the land to examine the files of the courts every time he wished to pay an instalment of the purchase-money, while no hardship could be occasioned by requiring plaintiff to make parties to his suit all persons in the open possession of the lands to be affected thereby. Senator Seward in his separate judgment in the case said: “I consider myself well supported in the view I have taken of this case, by the circumstance that I have not found, nor has there been shewn to the court, a solitary case in which the rule *lis pendens* has been applied to a person who purchased by contract and enters into possession, and in part performs his contract before suit commenced, and then *pendente lite* without actual notice fulfils his contract and takes a deed for the land.” Where a person entered into an *ante litem* contract for the purchase of the property from one entitled to it at the time, but before the contract was fully executed, a suit was brought against the vendor in which the contract was not attacked, and it was finally held that the purchaser would receive the title to the property free from *lis*

⁶⁰ Ben. Lis Pend. 291.| ⁶¹ 25 Am. Dec. 656.

pendens, although in pursuance of the terms of the contract, he paid the purchase-money, and took the conveyance, while the suit was pending.⁶²

In *Watson v. Dowling*,⁶³ a mortgage was made of certain property after the issue, but before the service of the summons in a suit for that property, and after the commencement of *lis pendens*, the property was sold by the mortgagee in exercise of his power, the purchaser was held to be bound by the judgment rendered in the ejectment case; as "the mortgagee and purchaser had a perfected right before *lis pendens* commenced, and for that reason were not subject to the rule."⁶⁴ The partial release in good faith of a mortgage pending a suit, brought concerning the mortgaged property after the mortgage and without impleading the mortgagee, is not *pendente lite*, as in such a case the rights of the mortgagee attach and become completed before the commencement of the suit, and the mortgagee and the releasee are *ante litem* claimants.⁶⁵ In *Fesster's Appeal*⁶⁶ an agreement had been made for the purchase of land upon which half the money had been paid when a suit was filed involving the land, and a summons served upon the holder of the legal title. The remaining half of the purchase-money did not become due until after *lis pendens* commenced; and it was held that though it was not such a *bonâ fide* purchase without notice as would protect the purchaser and avoid the *lis pendens*, the payment of the first instalment was *bonâ fide* and should be refunded. This decision is opposed to the general current of decisions on the point and does not appear to have been followed.

281. The rule of *lis pendens* applies to every sort of alienation, to an alienee of the plaintiff as of the defendant, and to a mortgage⁶⁷ as well as to a sale. In *Steele v. Taylor*,⁶⁸ the Minnesota Supreme Court said: "The rule is that the incumbrancers who become such *pendente lite* need not be made parties. They stand in no better position or more favorable light, relative to the parties, than a voluntary *bonâ fide* purchaser *pendente lite*, nor is it proper or reasonable that they should. They are in the same manner and to the same extent

⁶² *Shaw v. Padley*, 54 Mo. 519.
⁶³ *Hunt v. Haven's Adm.* 52 N. H. 162.

⁶⁴ 26 Cal. 127.

⁶⁵ *Hen. Lis Pend.* 2.

⁶⁶ *Soudder v. Van Amburg*, 4 Edw. Ch. 31.

7 Pa. St. 502.

Youngman v. Elmira R. R. Co., 65 Pa. St. 278.
Masson v. Saloy, 12 La. Ann. 776.

1 Minn. 278.

bound by the decree." The same reasons which led to the adoption of the rule *lis pendens* as applicable to *pendente lite* purchasers apply with equal force to the application of the rule to *pendente lite* incumbrancers, and all such incumbrances are bound by the decree or judgment in the pending case.⁶⁹ In *Winchester, Bishop of v. Paine*,⁷⁰ the rule was held to apply to a mortgage, Grant, M. R., observing that a mortgage taken *pendente lite* cannot be exempted from its operation.

Similarly, where a tenant takes a lease of property from a party to a pending suit, he will be bound by the decision in the suit, and not be able to enforce the rights apparently secured to him by the lease. In *Haven v. Adams*,⁷¹ a mortgagor had leased the mortgaged property pending a suit to foreclose the mortgage, and delivered possession of a portion of it to the tenant, who retained the actual possession thereof under a claim of right by virtue of some provisions of the mortgagee, after formal possession had been delivered to the mortgagee upon the execution issued upon the judgment recovered in his suit, and the tenant was held not to be entitled even to compensation for valuable buildings or improvements he had erected on the premises under a *bond fide* belief of his title. The same appears to have been held more recently in Illinois also in *Yates v. Smith*.⁷²

The rule has been held to apply even to the sale of a property in execution of a decree under the orders of a court pending a suit relating to that property.⁷³ Thus, in *Steele v. Taylor*,⁷⁴ the court with reference to a purchase of the property of one of the parties to a suit at an execution sale pending the suit said: "His purchase is wholly an act of volition on his part, and he receives and holds in his own right and not in trust for the use of others all the estate that he obtains by his purchase. He acts for himself wholly in making his bids and purchase, and is influenced and governed by his judgment of what under the circumstances his own interests, and not those of others, require or render advisable. He cannot be deemed other than a voluntary purchaser, though he receives his title by operation of law. The *lis pendens* is notice to him, and he takes the title *cum onere* precisely as he would by *bond fide* voluntary conveyance from the judgment-debtor, and his position

⁶⁹ Ben. Lys. 1 onl. 246.
⁷⁰ 11 Vos. 195.
⁷¹ 8 Allen. 363.

⁷² 11 Pa. 549.

⁷³ Cleveland v. Boernum, 24 N. Y. 613.

⁷⁴ 1 Minn. 274.

with reference to both the original parties to the suit is the same as it would be under such voluntary conveyance. It seems to me that it would be inconsistent and incompatible with other well established principles to allow him, for the protection of his own private interests, the benefits of the rules applicable to the case of a trustee upon whom the title had, by operation of law, been cast for the use of others, as in the cases of assignees in bankruptcy, or insolvency, and of receivers in Chancery. He does not hold the position or rest under the responsibilities, nor is he subject to any of the duties of such trustee, who as such is always subject to the jurisdiction and amenable to the call of the Court of Chancery, and entitled to the benefit of its directory orders. Nor does he stand in a light like that of an heir-at-law upon whom there is a descent by the death of an ancestor *pendent lite*." . . . Later in *Hart v. Marshall*,⁷⁵ the same court again said, "that the purchaser at the execution sale can acquire no title superior to that possessed by the judgment-defendant at the time of the creation of the judgment-lien, and if when such lien attached, the title of the defendant had already been tied up by the pendency of some other suit, the said purchaser can acquire nothing which is not also subject to the hazard of such other suit."⁷⁶ "The courts," says Mr. Bennett, "are uniform in holding that all such purchasers are voluntary *pendente lite* purchasers, and are bound by the determination of the pending suit precisely as if they had taken by voluntary conveyance from the party to the suit in whom the title was vested."⁷⁷ It is said that "where a bill in Chancery is filed against a judgment-debtor, attacking his title to real estate, and while *lis pendens* is in full force, an execution is issued upon a judgment at law, and the real estate involved in the Chancery suit is sold therein, the purchaser upon execution becomes a *pendent lite* purchaser and will be bound by the result of the litigation."⁷⁸ . . . Where a bill was filed to set aside a conveyance under which a judgment-debtor holds, and after the bill had become a *lis pendens*, as against the judgment-debtor, the property was sold in execution *pendente lite*, it was held that the purchaser acquired no title to the land at the judicial sale; that he did not become a *bonâ fide* purchaser for value, as the plaintiff, but was a *pendente lite* purchaser."⁷⁹ It will of course be different, however, where the decree in execution of which the sale takes place had become

⁷⁵ 4 V. Arn. 201.

⁷⁶ Ben. Les Pen l. 239.

⁷⁷ Ben. Les. Pend. 628.

Salter v. Salter, 6 Bush. 625.

Carr v. Farington, 63 N. C. 533.

Rider v. Kelso, 53 Iowa, 360.

a lien on the property before *lis pendens* commenced.⁸⁰ In such a case, the purchaser must of necessity be subject to the jurisdiction of the court in his rights derived from the purchase. One who purchases at a sale of mortgaged property made in pursuance of the directions of the decree of foreclosure, by that act submits himself to the jurisdiction of the court, in the suit in which the sale is made, as to all matters connected with the sale or relating to him in the character of purchaser, and so, when the mortgaged property is converted into money pursuant to the directions of the decree of foreclosure and sale, the purchaser stands in the relation of a trustee, having in his possession a trust fund which it is the duty of the court to dispense according to the rights of the parties litigant.⁸¹

In British India there has been some conflict as to whether the rule of *lis pendens* applies to a sale in execution. The negative view was taken by the Supreme Court in *Gour Monee Dabee v. Read*,⁸² and following that in *Nuffur Merdha v. Ram Lall*.⁸³ In *Ali Shah v. Husain Bakhsh*,⁸⁴ Pearson, J., expressed a doubt as to the application of the rule in such a case, and said that the doctrine of *lis pendens* "appears to be applicable to cases in which the alienation is of a voluntary nature and not to an alienee who has bought a property sold in execution of a decree." He did not explain the ground of this opinion and did not refer to any authorities or previous decisions. In *Lalu Mulji v. Kashibai*,⁸⁵ Birdwood, J., in delivering the judgment of the Bombay High Court observed that that "doubt seems to be well grounded, if regard be had to the object of the law relating to *lis pendens*, which affects a purchaser because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where the property is sold in execution of a decree, it cannot be correctly said that the owner gives any rights to the purchaser, who acquires his rights by operation of law." A similar view was taken in *Chunder Nath v. Nilakant*,⁸⁶ by Cunningham and Tottenham, JJ., the former having observed in the judgment of the court that "the doctrine of *lis pendens* appears to be grounded on the inconvenience which would arise, if mortgagors were able, after action brought, to alienate the mortgaged-property; but it does not follow that

⁸⁰ Ben. Lis. Pend. 278.

⁸¹ Ben. Lis. Pend. 251.

⁸² 11 Tay. & B. 83.

⁸³ XV W. R. 308.

⁸⁴ 1. L. R. I All. 588.

⁸⁵ 1. L. R., X Bom. 400.

⁸⁶ 1. L. R., VIII Cal. 690.

the rule would hold good where the alienation is not by the mortgagor, but by the Court, acting on behalf of creditors against the mortgagor, and where the process of sale, or at any rate proceedings with a view to the sale, of the property had commenced before the suit was instituted." On appeal this decision was reversed on other grounds, but their Lordships of the Privy Council, expressed a doubt of the correctness of the limitation on the doctrine of *lis pendens* referred to by the judges of the High Court.⁸⁷ The weight of authority appears certainly to be in favor of the opposite view, in favor of the view that a purchaser at a sale in execution pending a suit is bound by the result in that suit. This was held directly *Raj Kishen v. Radha Madhub*,⁸⁸ in which the decision of the Supreme Court was expressly dissented from in an elaborate judgment^b, and Sir Richard Couch, C.J., said:—

"The only effect of holding that the doctrine of *lis pendens* does not apply would be that the proceedings in the suit against the mortgagor would become ineffectual. If there is a sale in execution of a decree against him pending those proceedings, the person buying at the sale does not get more than the mortgagor had, that is, he gets only the right to redeem the property. And the result would be that the mortgagee (we use the term mortgagee to describe the person who is suing on the mortgage-bond to establish his charge, for the reasoning applies in the one case as much as in the other) would have to bring a fresh suit against the purchaser in order to foreclose him from redeeming; and if pending the suit, there was a decree against him in another suit, and in execution of it his right and interest were attached and sold and some person purchased it, a third suit would be necessary It would

^b Sir Richard Couch, C.J., in delivering the judgment of the High Court referring to the decision, said "The judgment of Sir James Colville is founded very much—we don't say altogether—but very much upon the fact that in the English Courts there had been no decision applying the doctrine of *lis pendens* to a case of that description. It does not appear to have occurred to him that at that time, from the state of the law in England, there could not have been such a decision. What remains in the mortgagor is only what is known as the equity of redemption. That was not an interest which could be taken by the sheriff in execution of a judgment of a court in England and be sold by him. It was not until the Act 1 and 2 Vic. C. 110, S. 13, by which judgments were made charges upon real property, that an equity of redemption could be sold in satisfaction of a judgment; and then it did not become the subject of a sale by the Sheriff, but was treated as an interest in the land—an estate in it which came within the operation of that Act. So the absence of decisions in the Courts in England upon the question which came before the Supreme Court is fully accounted for."

be impossible for the suit by the mortgagee to have the money realized by the sale of the mortgaged property to be brought to a successful termination, if persons buying under an execution against the mortgagor are not to be bound by the proceedings." This decision has been followed in *Lala v. Buli*,⁸⁹ *Jharoo v. Raj Chunder*⁹⁰ and in *Gobind Chunder v. Gurn Churn*.⁹¹ The same view was taken by the Bombay High Court in *Parvati v. Kisan-sing*.⁹²

282. The rule can apply only to the alienation of the right of a party to a pending suit.

lis pendens applies only to the alienations of the rights of either of the parties.

"As the operation of the law of *lis pendens*" says⁹³ Mr. Freeman, "cannot extend to persons acquiring title under either of the parties anterior to

the commencement of the suit, it is, if possible, still less applicable to persons whose title does not appear to be in any way connected with the parties to the suit. Therefore whoever purchases property from one whose title is paramount to that of the parties to the suit, or which, if not paramount, is not connected with it or them, by anything contained in the proceedings in the suit, or elsewhere affecting him with notice, cannot be prejudiced by their suit."⁹⁴ Similarly, Mr. Bennett says: "Mortgagees and grantees under deeds and bills of sale made by persons holding titles and not parties to the pending litigation, are unaffected by the subsequent *lis pendens*. Parties are required to examine only the records of suits involving the persons with whom they deal and from whom they acquire title and their grantors. They cannot be held bound to search for suits involving other persons than those occurring in the claim of title under which they become purchasers."⁹⁵ In *Green v. Rick*,⁹⁶ the land had been conveyed by persons other than the parties to the suit, and *lis pendens* was held by the Supreme Court of Pennsylvania, not to apply on that account also, and Clark, J., in delivering the judgment said, "Those persons only are charged with notice or affected by *lis pendens* who purchase from parties to the suit."⁹⁷

⁸⁹ I. L. R. IV Cal. 789.

⁹⁰ I. L. R. XII Cal. 290.

⁹¹ I. L. R. XV Cal. 94.

⁹² I. L. R. VI Bom. 569.

⁹³ Fr. Jud. 369.

⁹⁴ *Travis v. Topeka S. Co.*, 42 Kan. 625.

Allen v. Morris, 34 N. J. L.

⁹⁵ Ben. lis. pend. 292.

⁹⁶ 6 Am. St. Rep. 700.

⁹⁷ *Stuyvesant v. Hone*, 1 Sand. Ch. 413.

Parks v. Jackson, 25 Am. Dec. 655.

Thus where the interest of one of several persons owning a tract of land as tenants in common passes to a purchaser under execution sale, and he brings ejectment against the execution-debtor alone and recovers judgment, the judgment will not affect the rights of the other tenants in common, nor of their grantees who purchase and enter upon the land pending that suit.⁹⁸

So also, the rule will not affect a purchaser, who comes in *pendente lite*, under the holder of the legal title, with constructive notice of the equity claimed against it, unless the holder of the legal title had been impleaded at the time of the purchase, and if he should be made a party after the purchase, the *lis pendens* will not take effect by relation, so as to charge the purchaser with notice, although the property may have been specifically claimed and designated in the proceedings.⁹⁹ If, however, one should hold the legal title by an unrecorded deed, and the person holding the recorded title were made a party, the fact that the holder of the title not of record was not a party would not protect a purchaser from him.¹⁰⁰ But a suit brought against the administrator of an estate in the course of administration by a creditor of the estate will be *lis pendens* and notice to all the world of the prior right of the claimant, and a purchase from the heirs, pending the suit, of property which must be affected by the result of the suit will be charged with the prior lien of the plaintiff and bound by the decree or judgment against the administrator.¹

On this principle there can be no *lis pendens* between co-plaintiffs or co-defendants in any suit, "not designed to settle the rights of such plaintiffs or defendants between each other, no matter how many facts, not material to the present controversy, happened to find their way into the record. If, however, upon proper pleadings, one of the defendants is shown to have certain rights, as against the others, affecting specific property, and entitling him to relief with respect to such property in the present action, a purchaser, after such pleadings have been filed, and notice of the defendant's claim for relief registered, is bound as a purchaser *pendente lite*."² Where there were two mortgages upon the same premises, and

⁹⁸ Ben. Lis Pend. 209.

⁹⁹ Ben. Lis. Pend. 162.

¹⁰⁰ Norton v. Birge, 35 Cal. , 279.

Hoyt v. Jones, 31 Wis. 297.

¹ Ben. Lis. Pend. 222.

² Tyler v. Thomas, 25 Beav. 47.

in a suit by the first mortgagee for foreclosure the second mortgagee was made a defendant and had come in and answered, but before the cross-suit which was finally brought by him in the case became *lis pendens*, the mortgagor made another mortgage, it was held not to be subject to the *lis pendens* in favour of the second mortgagee.³ But where in such a case, the latter was foreclosed pending the suit to foreclose the first mortgage, and the premises were sold under the decree foreclosing the second mortgage, and purchased at the sale by the second mortgagee, the purchase would be subject to the *lis pendens* of the first suit.

283. It is universally agreed upon that the rule of *lis pendens* applies to immovable property, and notwithstanding some conflict of opinion,⁴ it may now be considered as generally applicable to personal property also.⁵ Mr. Bennett says, "I am thoroughly satisfied from a review of the authorities, that at the present time the doctrine is well established that, with the exception of negotiable paper, *lis pendens* applies to personal property as well as real estate."⁶ In *Swantz v. Pillow*,⁶ the subject-matter of the suit and finally of the decree was a mule, and Cockrill, C. J., in delivering the judgment of the Arkansas Supreme Court said: "One who purchases property in suit, with actual notice of the litigation, as the plaintiff in this action did, does so at his peril, and must abide the result the same as the party from whom he got his title. It was the duty of the sheriff, therefore, to take the mule in question from the plaintiff, notwithstanding he had paid the defendant in replevin full value for the animal."⁷ In *McCutchen v. Miller*,⁸ Justice Fisher in delivering the majority opinion of the Supreme Court of Mississippi, said: "The rule had its origin in controversies touching real estate; but it may be conceded, that at this day it

(c) "The contrary opinion has, however, ordinarily been expressed only in cases where the property involved fell within the conceded exceptions to the general rule, or the decision of the question was not necessary or involved in the disposition of the particular case."⁹

³ Hart v. Hayden, 79 Ky. 346.

Hall v. Grogan, 78 Ky. 12.

⁴ Fletcher v. Ferrel, 35 Am. Dec. 113.

Kellogg v. Fancher, 90 Am. Dec. 96.

Diamond v. Lawrence County, 78 Am. Dec. 420.

⁵ Ben. Lis. Pend. 198.

⁶ 7 Am. St. Rep. 98.

⁷ Hoffman v. Conner, 70 N. Y.

⁸ 31 Miss. 66.

Mile v. Left, 60 Iowa.

applies with equal force to controversies in regard to personal property."

The only exception usually recognised to the rule of *lis pendens* in its application to movable property is that of negotiable paper not due", a transfer of which may easily be prevented by its being ordered to be deposited in court, and an exception in regard to which is necessary on account of the paramount importance of preserving the negotiable character of such paper.¹⁰ In *County of Warren v. Marcy*,¹¹ Mr. Justice Bradley in delivering the judgment of the court expressed his concurrence with the opinion expressed by Chancellor Kent in *Murray v. Ballou*, and after discussing various cases, reached the conclusion in accordance with the leading authorities that the rule of *lis pendens* does not apply to negotiable paper. It has been contended sometimes that the exception should certainly be extended to all the ordinary articles of commerce.¹² The contention has not been successful, however, as there is even a greater necessity of the application of the doctrine to personal property, because of the ease with which personalty can be transferred to parties having no notice of the litigation, on which account the probability of the defendant's entirely defeating the object of the suit by a transfer of the property *pendente lite* is much greater in the case of such property than in that of real property. In some cases, the rule has been held not to apply where money, bank-bills, or other species of commercial paper are involved, and *bonâ fide* holders have acquired title thereto.¹³ Even Municipal bonds and the coupons attached to such bonds expressed in negotiable words have been held to be commercial paper, and on that ground to fall within the exception to the operation of the rule, unless brought into the custody of the court, or transferred after due, or with actual notice of some defence thereto, or other infirmity invalidating them.¹⁴ But the New York Supreme Court held in *Jeffres v. Cochrane*,¹⁵ that *lis pendens* should not be

(d) Even this exception is negatived in some of the States in America, and chiefly in Pennsylvania.

Edwards v. Banks, 35 Ga. 213.
Miss v. West, 95 Am. Dec. 379.
 97 U. S. 96.
Leitch v. Wells, 48 N. Y. 613.
Bond v. T. and P. R. Co., 46 Tex. 323.

Winston v. Westfeldt, 58 Am. Dec. 278.
Leitch v. Wells, 48 N. Y. 613.
 14 Ben. Lds. Pend. 148.
 15 48 N. Y. 671.

extended to money, bank-bills or commercial paper, nor to certificates of joint stock companies.¹⁶ In other States also the doctrine has been held not to apply to commercial paper.¹⁷ In *Hadden v. Sprader*,¹⁸ the suit was by a creditor who alleged that the debtor had fraudulently conveyed to H., the property consisting of choses in action, money and stocks; and pending the suit, assignments were made of the property involved or some of it, and Judge Woodworth in an elaborate judgment concurred in by Chief Justice Spencer, reviewed the English authorities, and following the cases of *Taylor v. Jones*;¹⁹ *Horn v. Horn*;²⁰ and *Partridge v. Gopp*;²¹ held that the trustee would be affected with notice and could not pass title to a purchaser from him *pendente lite*. The same view was taken by Chancellor Walworth, in the case of *Edmonton v. Lyne*,²² and again in *Corning v. White*,²³ and *Farnham v. Campbell*.²³ The same view was taken in the cases of *Birnknerhoff v. Brown*²⁴ and *Leitch v. Wells*.²⁵

The rule as enacted in British India has reference only to immovable property. It may be that the Legislature considered that in regard to movable property, Sec. 492 of the Civil Procedure Code will be a sufficient protection, as it provides that "if it is proved that any property in dispute in a suit is in danger of being alienated by any party to the suit, or wrongfully sold in execution of a decree, . . . the court may by order grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the alienation, sale . . . of the property, as the court thinks fit." Besides, Sec. 208 of the Civil Procedure Code lays down, that "when the suit is for movable property, if the decree be for delivery of such property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had;" and *lis pendens* has no application to suits for money;²⁶ even though the claim be for the value of the property specified in the plaint or for compensation for injuries thereto.²⁷ It appears more probable that the rule enacted here

¹⁶ *Holbrooke v. N. J. Zinc Co.*, 57 N. Y. 617.

¹⁷ *Duran v. Iowa City*, 1 Woolv. 73.

Stone v. Elliott, 11 Ohio, 252.

¹⁸ 20 Johns 554.

¹⁹ 2 Atk. 600.

²⁰ Amb. 79.

²¹ Ambler, 596.

²² 1 Paige, 640.

²³ 16 Paige, 601.

²⁴ 4 Johns, Ch. 671.

²⁵ 48 Barb. 649.

²⁶ *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

Ray v. Roe, 18 Am. Dec. 159.

²⁷ *Gardner v. Peckham*, 13 R. 1. 102.

did not refer to movable property, simply because the enactment in which it is contained relates to immovable property only. There is nothing to show that the rule, as so enacted, purports to be exhaustive; and the application of the doctrine to movable property, though apparently not recognized in the published cases in this country, will be governed by general principles.

The doctrine of *lis pendens* does not apply to money held by an officer of court, and ordered by that court to be paid to any one.²⁸ This is, however, on quite a different ground, on the ground of public policy, which requires that money held by another court should not be involved in litigation, and that the doctrine of *lis pendens* should not be enforced in respect to it. And it is on the same ground, that property held by one as a custodian of the law, or in some official capacity, is unanimously held to be not bound by *lis pendens*.

284. It appears to be generally agreed upon that the rule does not apply, if the suit is not for specific property, and does not affect any property not necessarily bound by the suit. Thus in *Worsley v. The Earl of Scarborough*,²⁹ the Court said: "No case has gone so far, and it would be very inconvenient if where money is secured upon an estate, and there is a question depending in this court upon the right of or about that money, but no question relating to the estate upon which it is secured, that a purchaser of the estate pending the suit, should be affected with notice by such implication as the law creates by the pendency of a suit." In the United States also, it has been held that the rule relates only to suits involving title to property, and is not to be extended beyond the property involved in the suit.³⁰ In *Green v. Rick*,³¹ only the title to a mortgage of certain land was involved in a suit, and it was held by the Pennsylvania Supreme Court, that the doctrine of *lis pendens* would not apply to a sale of the land itself, Clark, J., observing that "we are not aware that the doctrine has ever been carried to cases where the party to be affected by it was not strictly a purchaser, *pendente lite*, of the property in litigation."

Lammon v. Fensier, 111 U. S. 17.
 Covell v. Heyman, 111 U. S. 176.
 Ward v. Hartford Co., 12 Conn. 404.
 Clark v. Boggs, 6 Ala. 809.

McMeekin v. State, 9 Ark. 553.
 3 Atk. 392.
 1 McCord's R. 264.
 6 Am. St. Rep. 760.

In *Hailey v. Ano*,³² Andrews, C. J., in delivering the judgment of the New York Supreme Court said: "We have been unable to find any authority in support of the proposition that the purchaser of land pending a suit in trespass between the grantor and another, in which the issue of title has been made, takes subject to the judgment which may be subsequently rendered in that action, or that he will be concluded thereby. . . . The purchase of the land from a defendant against whom an action for trespass is pending, does not affect the plaintiff's claim or right of action. He can recover his damages as if no sale of the land had been made, and his remedy can be pursued unimpaired by the transfer of the land. The transfer is productive of none of the consequences which the doctrine of *lis pendens* was intended to prevent. That doctrine prevented the acquisition *pendente lite* of an interest in the *subject-matter* of the suit, to the prejudice of the plaintiff, because otherwise there would be no end of any suit; the justice of the court would be evaded, and great hardship and inconvenience to the suitor would be necessarily introduced.³³ The grantees of F. A. acquired by the deed no interest in the *subject-matter* of the pending litigation. The most which the plaintiff can claim is, that by the transfer of the land *pendente lite*, the question of title may be open to contestation unless the doctrine of *lis pendens* applies. We are not bound to any authority on the question now considered, and we think it would be unwise to apply the doctrine of *lis pendens* in such a case as this. . . . The theory that parties are presumed to be cognizant of what is passing in the sovereign courts of justice, assumes that by consulting the records of the courts the fact may be ascertained; but we think the pendency of a trespass suit does not prevent a purchase of the land upon which the trespass was committed *pendente lite*, or give to a judgment for damages subsequently recovered therein the effect of an adjudication binding the title of such intermediate purchaser, even though he may have known that the action was for a trespass upon the lands purchased." In *Briscoe v. Bronaugh*,³⁴ the claim was to enforce a lien for purchase-money on certain land, but the decree was so framed as merely to determine the amount of the purchase-money, without any provision in regard to the lien, and a person, who purchased the land

³² 32 Am. St. Rep. 764.³³ *Hopkins v. M'Laren*, 4 Cow. 678.| ³⁴ 46 Am. Dec. 108.

pending the suit though with full knowledge of the equitable lien, was held to be not affected by *lis pendens*. "This conclusion," says³⁵ Mr. Bennett, "necessarily follows from the well settled principles which have already been considered. In such an action whether it be an *assumpsit*, debt, trespass, trover, or case, or although in equity, it must be limited to a contention over a simple moneyed demand. There is never any issuable allegation in the pleadings which should be considered as constructive notice that any particular property of the defendant is sought to be charged with the judgment or decree which may be obtained against the defendant. All that may be inferred from the suit is that a claim may result against the defendant's estate generally, which, if maintained, may have to be satisfied out of his real or personal property, or possibly neither. If the rule *lis pendens* were pushed to the extreme of an application in actions *in personam*—whether arising *ex-contractu* or *ex-delicto*, defendants would have to submit to any exactions which claimants, upon unfounded and unjust claims, might make against them, or quit doing business altogether. If the pendency of a personal action were constructive notice of *lis pendens*, it would be liable to be made efficient upon any of the property of the defendant of whatever character, and there would be a practical prohibition against dealing with the defendant pending the litigation. It would, therefore, be against public policy to apply the rule to personal actions."

It is not necessary, however, to constitute *lis pendens*, that the suit is for the recovery of the property. Thus, if the relief sought includes the recovery of possession or the enforcement of a lien, or the cancellation or creation of a muniment of title, possession, or right of possession of specific property, there is or may be a *lis pendens* sufficient to bind subsequent purchasers or encumbrancers.³⁶ Mr. Bennett observes that "It is well settled in this country, that if a creditor files a bill to set aside fraudulent conveyances, and to have the property applied, by the aid of a court of equity, to the payment of his judgment, although no lien has been or can be acquired at law, he acquires a specific lien or power over the property by filing the bill, and is entitled to priority over other creditors, and that any party purchasing the property sought to be subjected to the claim is

³⁵ Ben. Lis. Pend. 203.
³⁶ *Rosenheim v. Harstock*, 90 Mo. 357;

Spencer v. Credle, 102 N. C. 68.

a purchaser *pendente lite*.³⁷ "38 The pendency of a suit for the partition of lands does not withdraw the lands which are sought to be partitioned from the reach of an execution at law against the interest of a part owner. An execution against such part owner may be levied upon his interest in the lands, and the lands sold pending the partition case,³⁹ though in such case a *pendente lite* purchaser must accept such interest as the court in the pending case may allow to him whose interest was purchased at the execution sale.⁴⁰

The primary object for which the suit is brought is not material, provided the court has jurisdiction of the property for secondary purposes.⁴¹ Thus if in a suit for alimony, relief is sought in respect of specific property, either by making it chargeable with the payment of alimony, or setting it apart for the use of or as the property of one of the parties, or of partitioning or dividing it between them, the doctrine of *lis pendens* will apply.⁴² In *Ulrich v. Ulrich*,⁴³ the suit was for alimony and maintenance, yet the Supreme Court of the District Columbia held the rule of *lis pendens* to apply, as a certain lot was described in the bill, and it was alleged that the lot constituted the principal property of the defendant out of which the alimony should be decreed. In *Wilkinson v. Elliott*,⁴⁴ the suit was for divorce and alimony from certain property specifically described, and it was contended that the doctrine had no application in such suits, "because the matter upon which the jurisdiction acts is the *status* of the parties, and not the disposition of the property," but Johnston, J., in delivering the judgment of the Kansas Supreme Court said: "If a divorce is asked on account of the fault of the husband, the wife may ask not only that all her own land may be restored to her that has not been disposed of, but may describe particular property belonging to the husband, and ask that the same may be set apart for her as permanent alimony. When this is done, the property is made the subject-matter of litigation, and is brought within the jurisdiction of the court, and any one who purchases the same should be bound by the judgment or decree thereafter rendered. If in such an action there was no specific property pointed out, but only a general prayer for alimony, the doctrine would not apply, for the

³⁷ *McDermott v. Strong*, 4 Johns. 667.
³⁸ *Farnham v. Campbell*, 16 Paige, 598.
³⁹ *Hadden v. Sprader*, 20 Johns, 554.
⁴⁰ *Ben. Lis. Pend.* 141.
⁴¹ *Ben. Lis. Pend.* 330.

⁴² *Hawes v. Orr*, 10 Bush. 437.
⁴³ *Ben. Lis. Pend.* 164.
⁴⁴ *Sapp. v. Wightman*, 103 Ill. 150.
⁴⁵ 3 Mackay, 290.
⁴⁶ 19 Am. St. Rep. 158.

reason that the alimony might be awarded out of either real or personal property; and as no particular property was described and made the subject-matter of the litigation, no one could have notice that any particular property was involved.” The same was held in *Powell v. Campbell*,⁴⁵ in which the plaintiff “prayed for a decree of divorce, and that all the real and personal property of the defendant be set apart to her for her support and maintenance,” and Leonard, C. J., in delivering the judgment of the Nevada Supreme Court said: “In many cases where, in divorce proceedings, the application is for alimony proper,—that is, an allowance to be paid at regular periods for the wife’s support,—and especially where there was no statute allowing her any specific part of the husband’s estate, it has been held that the rule of *lis pendens* does not apply, because such a suit is *in personam*, and does not apply to any specific part of the personal or real estate of the husband:”⁴⁶ But where the statute permits the husband’s estate to be set apart to the wife for life, or, if necessary, in fee, for her support, and in her complaint she specifically describes property which she asks the court to decree to her for her support, there seems to be no well-founded reason why the rule of *lis pendens* should not apply. True, it may be said that the decree of divorce is the first object of the suit, and that support is but an incident. But it is also true that when divorce is sought and granted, and support is required from the husband, the law permits the court, and it is the court’s duty, to provide such support as is reasonable and just, under all the circumstances. In such a case, a purchaser *pendente lite*, with notice of the suit and its objects, knows that the property described may be decreed to the wife, and that one of the objects of the suit is to obtain a decree awarding such property to her.”

But if in such a suit or in suits for the division of common or other property, the plaintiff does not designate particular property, and seek to subject it to the satisfaction of the wife’s claims, or to have it set aside as hers or for her use, the rule of *lis pendens* will not apply as her suit does not apply to any specified part of the husband’s estate.⁴⁷ The judgment which may be obtained may constitute a lien on certain property, but it cannot constitute *lis pendens*, because for that it

⁴⁵ 19 Am. St. Rep. 350.⁴⁶ *Almond v. Almond*, 15 Am. Dec. 781.⁴⁷ *Scott v. Rogers*, 77 Iowa, 483.*Feigley v. Feigley*, 61 Am. Dec. 375.

is not sufficient that the judgment unless otherwise paid will be satisfied out of the sale of certain estate, but it is necessary that its sale must be directed by the judgment as part of the relief sought by the complaint. In *Brightman v. Brightman*,⁴⁸ the Rhode Island Supreme Court said: "The prayer of complainant's petition was for divorce and for alimony out of her husband's estate. It did not affect the title to his real estate, or necessarily seek to put any incumbrance on it. Alimony is to be granted out of the personal or real estate, and is not necessarily a charge on either. Had the prayer in this case been for alimony to be assigned her out of this particular form, the case would somewhat resemble some of the cases in the books, where the rule has been applied. But it is not so; it is general for alimony out of his estate. If such a prayer locks up the real, it equally does the personal estate of a respondent to such a petition, and each and every part of it. The instant such a petition is filed, the respondent's business, however extensive it may be, must stop; purchasers and dealers with him, by the policy of the law, are bound by the decree of alimony that may be passed; although they do not even know that they are dealing with a married man. Alimony will be claimed and must be allowed to attach to any and every part of the personal property that the husband had at the filing of the petition. We do not think the case falls within the rule of *lis pendens*, nor within the reason of that rule." In *Houston v. Timmerman*,⁴⁹ the rule was held not to apply even though the suit was for a divorce and for an equal undivided one-third of the real property then owned by the husband (defendant). Lord, J., in delivering the judgment of the Oregon Supreme Court said: "The divorce suit of the plaintiff was not brought specifically to recover the one-third of the real estate of her husband, as was decreed in the divorce proceeding. The land was not the subject-matter of the litigation, and the subject of the suit was not to recover title that belonged to the plaintiff. It was incidental and collateral to the divorce proceeding. The court has no jurisdiction to affect the title of the husband to his lands, or decree that one-third of them shall be set apart for her in her own right and title, independent of a decree for divorce. Nor has the plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for divorce. . . .

The matter upon which the jurisdiction acts is the *status*; the marriage is the thing which the suit is brought to dissolve,—it is the subject of the litigation,—but as incidental to it, the court may grant temporary alimony *pendente lite*, or permanent alimony when a decree for divorce is rendered. And the general rule is, that bills for alimony do not bind the property of the defendant with *lis pendens*.⁵⁰ But the court cannot affect the title of the real property of the defendant in a divorce proceeding until the point is reached that a decree of divorce is to be rendered. Temporary alimony may be granted *pendente lite*, but the title of the real estate of the defendant remains intact, and cannot be affected during the pendency of the proceeding, but only when the proceeding for a divorce has terminated, and a decree rendered that the marriage is dissolved, and then only by force of the statute It must be manifest, then, that the primary object of the suit is to affect the marriage relation,—its *status*,—that it is the specific matter in controversy to be affected, and that it is only when the *status* is changed by a decree of divorce that the statute operates to divest title owned by the defendants, and that it then becomes the duty of the court to enter a decree in accordance with its provisions In *Daniel v. Hodges*⁵¹ the proceeding was for alimony, and the only property which the husband owned was a lot that the wife sought to have subjected to her claim, and was in actual possession of it by order of the court, when her husband, pending the litigation, conveyed it to another, and the court held, under the exceptional circumstances of the case, that the doctrine of *lis pendens* applied. There the proceeding was to subject the specific thing to her claim, which the husband attempted to defeat by conveying away the property, and the court, while admitting the general doctrine that a *lis pendens* was not applicable in such cases, said: ‘We are of the opinion the petition for alimony, under the particular circumstances of the case, constituted such a *lis pendens* as affected the purchaser with notice, independent of the actual notice had,’ and rendered the deeds void. But this has no relevancy to the case at bar. There she sought to subject the property to her claim for alimony, and the suit was directed specifically against it, and she was put in actual possession by order of the court; and then it was only ‘under the peculiar

⁵⁰ *Brightman v. Brightman*, 1 R. I. 112.
Isler v. Brown, 66 N. C. 556.

| *Almond v. Almond*, 15 Am. Dec. 731.
⁵¹ 87 N. C. 97.

circumstances of the case' that the court thought the purchaser from the husband pending the litigation was affected with the rule of *lis pendens*. Here there was no alienation of the property, which was only incidentally involved, or any charge of any act on the part of the defendant Houston to defeat any right whatever which might accrue to the plaintiff if the marriage should be dissolved. If the defendant Houston had conveyed away the property to another with the object of defeating her right, upon a decree for divorce, to any interest in his lands, such purchaser may be affected with the rule of *lis pendens* in such case; but that is not the question here. The debt which the defendant Houston owed the defendant Timmerman was contracted long before the suit for divorce was commenced, or the cause or ground of the divorce existed, and doubtless the credit was given on the faith of the property, a part of which included the property in dispute, then owned by Houston. There is no pretence of any fraud or collusion, or that the debt is not an honest obligation which Houston ought to have paid long before the divorce proceeding was instituted. Although the commencement of the divorce suit might result in a decree which would affect the property of the defendant, the property was not the subject specifically of the litigation, and by reason thereof was not withdrawn from such burdens as might be legally imposed upon it for just claims upon judgments recovered and docketed against its owner prior to divesting him of his title by force of the statute under the decree. The defendant Timmerman had the legal right to commence her action to recover the money due on the note of Houston, and the fact that the wife of Houston had instituted proceedings for a divorce did not affect that right, but when judgment was recovered thereon, and docketed by force of law, the lands then owned by him in that county, including the land in dispute, became subject to the lien of such judgment; and as the facts show that this was before any decree was rendered in the divorce whereby title to such lands could be divested, it follows that whoever took title from him subsequently, either by contract or by operation of law, took said title *cum onere*, or subject to the lien of such judgment. It results, as a purchaser of said lands at an execution sale upon such judgment, the defendant Timmerman

was not affected by or subject to the rule of *lis pendens*, and her deed thereby rendered invalid.”

Similarly a suit against a corporation to forfeit its charter,⁵² or against its directors to compel them to perform their duties,⁵³ in which no property is described does not affect *pendente lite* purchasers. But a suit to establish a last will and testament will constitute a *lis pendens* affecting with notice a purchaser either under the devisee or under the heirs.⁵⁴

285. It has been said in some cases⁵⁵ that to constitute *lis pendens* the plaint in the suit “must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation.”

This is quite true, where there is nothing in the proceedings except the simple description of the property, which may put the public upon inquiry or give a clue as to where further and more definite information can be had. “On the other hand,” says Mr. Bennett,⁵⁶ “if enough appears in the proceedings to put a purchaser on guard, although they do not in themselves describe the property with that particularity which amounts of itself to complete identification, *lis pendens* would be created.” Thus in the case of *Green v. Slayter*⁵⁷ where the bill described the property as ‘divers lands in Crosby’s manor,’ and as held in trust for the complainant by defendant Winter—and it was shown that Winter’s trusteeship in the lands was matter of public notoriety—Chancellor Kent said: “It is true, there might have been divers lands in Crosby’s manor held in trust by Winter, and yet the lots sold to defendant have been held by him in his own absolute right. But though this was possible it was an improbable fact; and if ever a bill contained sufficient matter to put a party upon inquiry, the bill in 1809 answered that purpose. . . . The general rule is, that what is sufficient to put the party upon inquiry is good notice in equity. The least inquiry, even of Winter himself,

⁵² *Havemeyer v. Superior Court*, 18 Am. St. Rep. 192.

⁵³ *Paine v. Root*, 121 Ill. 77.

⁵⁴ *Garth v. Ward*, 2 Atk. 174.

Garth v. Crawford, Barn, 45 .

⁵⁵ *Miller v. Sherry*, 2 Wall. 237.
Low v. Pratt, 53 Ill. 438.

⁵⁶ *Ben. Lis Pend.* 155.

⁵⁷ 4 Johns. Ch. 39.

would have satisfied the purchaser that the lots he purchased were parcel of the trust lands mentioned in the bill." "From this decision which seems to be sustained by reason," says Mr. Freeman, "it would follow that the description in the bill need not, in itself, be so specific as to necessarily and beyond all possibility include a given tract of land; but that it is ample for the purpose of invoking the rule of *lis pendens*, if the land in all probability comes within the description, and if prospective purchasers, upon reading the bill, are advised by it that the land with which they propose to meddle may be, and probably is, a parcel of the lands in litigation. . . . Where a suit was, among other things, to restrain a trustee from 'selling any more of the trust negroes,' it was held not to affect the purchaser of a negress, because there was nothing calling attention to her in the bill as the identical property in litigation."⁵⁸ ⁵⁹ "The property upon which the *lis pendens* is to operate," says Mr. Herman, "must be so identified in the action as to notify all who may subsequently become interested in the estate that there is an action pending which may or will affect it, and that if they become interested in it, they do so at their peril—that is, it must be sufficiently certain to give the means of distinct and intelligible information of the matter to which it relates."⁶⁰ Mr. Bennett observes that "it may be said in general that a *lis pendens* will be created where the property involved in suit is described either by such definite and technically legal description that its identity can be made out by the description alone, or where there is such a general description of its character, or status, and by such reference that, upon enquiry, the identity of the property involved in litigation can be ascertained."⁶¹

In determining whether legal proceedings are sufficient to constitute notice *lis pendens*, all of the pleadings including exhibits made a part of them are to be considered. But parties are not required to look beyond the pleadings and exhibits. Evidence taken and filed in the case, after it is commenced, ought not to be construed as constituting notice *lis pendens*. If the rule were extended thus in its application, it would often prove a snare to innocent parties. Evidence and depositions are not records until

⁵⁸ Lewis v. Mew, 1 Strob. Eq. 180.
 Jones v. McNarrin, 28 Am. Rep. 69
⁵⁹ Fr. Jud. 361, 362.

Herm. Comm. 211.
 Ben. Lis Pend. 154.

incorporated into a bill of exceptions or certificate of evidence; and it would be a great hardship to require the public to read voluminous evidence, and know as matter of law just when such evidence or the exhibits thereto became files of the courts. This limitation upon the doctrine of notice *lis pendens* would seem to be a reasonable one, because it is supported by the same reasons which recommend the doctrine of constructive notice itself. Thus it will be seen that, although it is necessary, in order to constitute *lis pendens*, that the proceedings should, directly or indirectly, designate specific property; yet where the description is so definite that any one reading it can learn thereby either by the description or reference what property is intended to be made the subject of litigation, it is sufficient.⁶² It is further necessary, in order to conclude purchasers by virtue of a judgment, that by the record in the case at the time of the purchase the parties to the suit and the nature of the claim made to the property should be so stated that no subsequent amendment will be necessary. If any amendment is made, *lis pendens* as to the matters and parties involved in the amendment dates from the time it is made.

286. The restriction of the rule to the proceedings in the courts of British India is in accordance with general principles, and therefore applicable even in proceedings for movable property. *Lis pendens* attaches only to proceedings in domestic courts. Such a limitation of the rule to the confines of the State, in a court whereof a suit may be pending no doubt encourages the disposal of the property outside the State to innocent purchasers, yet it must be regarded as established; and purchasers of property situate in one State cannot be bound by judicial proceedings against it in another, of which they had no notice.^e

In *Carr v. Lewis Coal Co.*,⁶³ Sherwood, J., in delivering the judgment of the Missouri Supreme Court said: "A *lis pendens* should not have any force or operation beyond the boundaries of the state where the suit is pending.

^e Thus M. Moreau says. "*Il faut en conclure que le procès engagé à l'étranger est absolument sans valeur, et qu'il ne produira devant nos tribunaux aucun des effets attachés France aux instances déjà engagées.*"

⁶² Ben. Lis Pend. 157, 158.

⁶³ 9 Am. St. Rep. 323.

. . . If the process itself cannot be extended or be served beyond the territorial limits of the sovereignty whence issued, certainly a mere incident of the service of such process, as is a *lis pendens*, can have no greater force or further-reaching operation. The principle of the rule being discussed is the prevention of the judgments and decrees of courts from being frustrated by transfers whilst matters are yet *in fieri*, and thus balking such judgments and decrees of their customary operation after they are rendered. But where can such obstructions be cast in the way of such adjudications? Obviously, only in the sovereignty where the adjudications are had. If the property be eloigned, taken beyond the confines of the jurisdiction where litigation is in progress, to say that it shall bear with it, no matter where taken, the effects and consequences of previous litigation, and conclusively bind any purchaser, however innocent of wrong, though the property has no history or ear-marks of litigious strife about it, would be carrying the doctrine of *lis pendens*—a harsh doctrine at best, and one not favoured by the courts, as all the authorities agree—to a most extraordinary and pernicious length. These views find support in the case of *Shelton v. Johnson*.⁶⁴ Of course, these remarks are limited to a case where personal property of a movable nature is, pending litigation concerning it, withdrawn from the jurisdiction where such litigation is pending to another state, and there sold to a *bonâ fide* purchaser. It is a very harsh presumption and rule which force the citizens within the same state to take notice at their peril of all matters being adjudicated within its borders,—a rule only justified by imperative necessity; but to say its operation shall be extended to every portion of the United States would be a very startling extension of a rule already sufficiently odious and oppressive.” “The argument in favor of this conclusion,” says Mr. Bennett, “is that the extent of constructive notice as to what is transpiring in the courts is limited by State lines or the territorial jurisdiction of court, that it would seem to be against public policy to enforce the doctrine of *lis pendens* when applied to personal property which had been taken beyond the limits of the state; because it would interfere with commercial transactions, and overturn in

⁶⁴ 70 Am. Dec. 265.
Vide, *Powell v. Williams*, 48 Am. Dec. 108.

Thoms v. Southard 26 Am. Dec. 467.

practice the presumption that the title to chattels proves upon delivery; that as to such property, if the rule *lis pendens* were enforced in foreign states, it would require a purchaser to search the records of the courts in all the States before being assured that he was acquiring a title, or purchase at his peril this species of property, thus placing an embargo on sales, and requires purchasers to take risks which no prudent buyer would assume and pay full value for property."⁶⁵

287. The doctrine presses with great severity sometimes on *bonâ fide* purchasers without notice of the pending suit, and in England and some of the United States, it has been attempted to avoid the hardship by requiring the filing of notices of suits concerning real property. In England it was enacted, for instance, that a *lis pendens* should not bind a purchaser or mortgagee without express notice thereof, unless and until it is duly registered, and the registration to be binding must be repeated every five years. And the court before whom the litigation is pending may, by 30 and 31 Vict. c. 47, Sec. 2, on the determination of the litigation, or even during pendency if satisfied that the litigation is not prosecuted *bonâ fide*, order the registration to be vacated without the consent of the party by whom the *lis pendens* was registered. In this country, notwithstanding an elaborate system of registration, there is no provision yet for the registration of a *lis pendens*. Even in England and the States having such *lis pendens* statutes, full complete actual notice from a litigant of the contemplated commencement and pendency of the suit, and also of what will be or is involved therein and what is claimed in respect thereto, is held sufficient to bind the party acquiring the knowledge with the force of *lis pendens*. Thus it was said in *Bucker v. Pierson*⁶⁶ that "a purchaser from a party to the suit pending the litigation, with full knowledge of the litigation, is bound by it;" and that to bind one who has actual notice it is not necessary that a notice of *lis pendens* should be filed. The Supreme Court of California has held the same in *Sampson v. Ohleyer*.⁶⁷

In *Scotland County v. Hill*,⁶⁸ Mr. Justice Waite, delivering the opinion of the Court, said that actual notice to a purchaser even of certain negotiable bonds, before the purchase, of their invalidity, or of an injunction against their issue or delivery, would have the effect of a *lis pendens* upon the purchase.

In *Roberts v. Jackson*⁶⁹ it was held that a person who purchased through an agent, who knew of the Chancery suit before the service of summons on the defendant was a *pendente lite* purchaser. In several cases in which the rule of *lis pendens* has been held not to apply, the circumstance of the alienee pending the suit not having notice thereof has been expressly referred to. This principle also is of a general application. Thus Lacombe observing as to the French Law that *la chose jugée contre l'auteur n'est opposable qu'aux ayant cause dont le titre ne remonte pas à une époque antérieure à la décision définitive du litige*, says that this is on the supposition that the third person has acquired the property in litigation in good faith; *car s'il n'avait en pour but que de gêner le cours du procès et de nuire au demandeur, il se serait rendu coupable à son égard d'un quasi-délit dont il devrait réparation, et qui ne saurait rendre sa position meilleure.*

⁶⁸ 112 U. S. 183.

⁶⁹ 1 Wend. 486.

CHAPTER XII.

A.—BAR FOR JOINTNESS.

288. There remains another class of cases in which a judgment on a cause of action against any person is held to bar a subsequent suit against other persons jointly liable in respect of the same cause. As observed by Field, J., in *Cambefort v. Chapman*,¹ “the principle of the maxim *nemo debet bis vexari* applies not only to the case of one individual being sued twice for the same cause of action, but also to the case of a person suing twice on the same contract.” It has, of course, never been doubted that a judgment with satisfaction on a joint debt must operate to put an end to all proceedings. There has long been a complete unanimity in favor of the application of the same principle to a judgment with satisfaction on a joint tort. In *Cocke v. Jenner*² it was held that even if separate suits were brought against joint-tort feorsors, the plaintiff after having taken one satisfaction could take no more. In *Corbet v. Barnes*³ the Court said, that for one tort the plaintiff might bring several suits, “but when recovery is had against one, and satisfaction, the plaintiff cannot have a second satisfaction, any more than where separate suits are brought upon a joint and several obligation.” The same doctrine was affirmed by Lord Mansfield in *Bird v. Randall*.⁴ In *Brinsmead v. Harrison*,⁵ Kelly, C. B., said: “That a judgment and execution, with satisfaction, would be a defence, is not disputed. A long series of authorities has so laid down.” In the United States it has been held in several cases, that if the plaintiff recovers a judgment against one of the joint-tort-feorsors and obtains satisfaction, the others are discharged of all liability in respect of that tort.⁶ It has even been said, that ‘if judgment is obtained in one action and satisfied, while the others are pending, such judgment and satisfaction may be pleaded in bar of any further prosecution of such other actions, and in that case the plaintiff will not be entitled to judgments for

¹ 19 Q. B. D. 232.

² Hob. 66.

³ Wm. Jon. Rep. 375.

⁴ 3 Burr. 1345.

⁵ 7 C. P. 551.

⁶ *Mathews v. Lawrence*, 43 Am. Dec. 665.

Stone v. Dickinson, 61 Am. Dec. 727.

Karr v. Barstow, 24 Ill. 480.

Luce v. Dexter, 135 Mass. 23.

nominal damages and costs, but judgment must be given for the defendants.⁷

In default of satisfaction also, the bar was held to apply, more than three centuries ago, in the very early case of *Brown v. Wootton*,⁸ in which Popham, C. J., is reported to have said, "if one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass." This view was, however, not adopted at the time by the courts,⁹ and satisfaction remained for a long period the sole ground of the bar in such cases; and it is only recently that the rule may be considered as having become established in England in the broad form in which it has been enunciated above. But though rather curious, it may be observed that the history of this doctrine had been just the reverse among the Romans, where a similar rule of the ancient Roman Law was in the course of its development superseded by the more equitable rule that, unless there was satisfaction as well as judgment, the creditor was at liberty to proceed against the debtors by separate actions.

289. In the earlier decisions in England, the principle of bar for jointness was rested on the ground of the doctrine of merger, which has been described as the consumption of a right of action by the recovery of a judgment upon it. It was maintained that the cause of action of the first suit having been absorbed or transformed into a remedy of a higher nature, would be extinguished and, therefore, cease to exist so as to form the cause of another suit. Thus Baron Parke, in the well-known case of *King v. Hoare*,¹⁰ observed that "the judgment of a court of record changes the nature of that (original) cause of action, and prevents its being the subject of another suit." The doctrine of merger soon came to be supplemented by that of election, or of waiver by election, the traces of which also may still be found in the decisions of courts. Thus in *Sessions v. Johnson*,¹¹ the United States Supreme Court, referring to the rule that the promisee may elect to sue the debtors jointly or severally, said: "Even in that case, the rule

⁷ *Savage v. Stevens*, 128 Mass. 254.

Mitchell v. Libbey, 33 Me. 74.

⁸ Cro. Jac. 73.

⁹ *Vide* cases to the contrary collected in *Livingston v. Bishop*, 3 Am. Dec. 330.

¹⁰ 13 M. and W. 504.

¹¹ 95 U. S. 247.

is subject to the limitation that, if the plaintiff obtains a joint judgment, he cannot afterwards sue them separately ; for the reason that the contract or bond is merged in the judgment ; nor can he maintain a joint action after he has recovered a judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy." In *United States v. Price*,¹² the Supreme Court said: "It is essential to the idea of election that a man cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security being superseded, merged, and extinguished in the judgment, which is a security of a higher nature." As a natural result of this doctrine of election, it was held in Pennsylvania, that the plaintiff's choice in such a case would be determined by his action, and not by the result of the action;¹³ and to avoid the apparent anomaly of such a course, it was further held that the reasonable view was, that the election would not be irrevocable until after judgment had been rendered.¹⁴ The theory of the principle of election as the basis of the doctrine of bar for jointness may be considered as quite exploded now. Thus in *Kendall v. Hamilton*,¹⁵ Lord Blackburn having observed that the circumstance of the plaintiff having at the time of the prior suit known that the defendant in the subsequent suit was joint with the defendants in the first suit was immaterial, said: "If the principle on which *King v. Hoare* was decided had been that, by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it would be material ; for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But *King v. Hoare* proceeded on the ground that the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action."

¹² 9 How. 83.¹³ *Beltshoever v. Commonwealth*, 1 Watts, 126.¹⁴ *Clinton Bank v. Hart*, 5 Ohio St. 33.¹⁵ 4 App. Cas. 542.

It is now generally agreed upon that the doctrine depends upon the principle of the indivisibility of the cause of action, upon the principle that a plaintiff cannot be entitled to split his cause of action in regard to the persons against whom the claim or remedy exists any more than in regard to the claim or remedy itself. Thus in *King v. Hoare*, Baron Parke pointed out that "the cause of action being single cannot afterwards be divided into two." However, the rule of bar for jointness, though based on the same principle as, and resembling, that of bar by suit in several respects, is generally recognized to be distinct from it in depending for its immediate application on a decision by a Court and not on an act of the parties themselves. In recent cases, the rule is usually supported on grounds similar to those on which the doctrine of *res judicata* is based. In fact, the rule of *res judicata* in regard to a second claim by a plaintiff successful in a prior suit on the same cause of action is also based on the same doctrine of merger. And, as such, the rule is subject to most of the rules relating to a decision as a bar on the ground of *res judicata*. Thus there will be no merger, if the judgment is void¹⁶ on any ground, or though *ab initio* valid is reversed on appeal or otherwise set aside,¹⁷ as there being no final determination of the cause of action in such a case, there is nothing to prevent the parties seeking for such a determination. The effect of the merger is, however, held to be not destroyed merely by the presentation or admission of an appeal.¹⁸ Where the judgment on account of the jurisdiction of the court affects only specific property and not the defendant's personal liability, there will be no merger in regard to the defendant personally.¹⁹

290. There appears to be a general unanimity in regard to the application of the doctrine of bar for jointness in the case of contracts that are not several but joint. The leading case on the subject in England is that of *King v. Hoare*, in which Baron Parke pointed out that it appeared from a comparison of all the reports of *Brown v. Wootton*,²⁰ that the true ground

Wixom v. Stephens, 97 Am. Dec. 208.

Yon. v. Baldwin, 76 Ga. 769.

Fries v. Pennsylvania, R. R. Co., 95 Pa. St. 142.

Fleming v. Riddick, 50 Am. Dec. 119.

Maghee v. Collins, 27 Ind. 83.

¹⁶ *Cloud v. Wiley*, 29 Ark. 90.

¹⁹ *Bonesteel v. Todd*, 80 Am. Dec. 90.

²⁰ *Oro. Jac.* 73; *S. C.* as *Brown v. Wootton*, *Vel.* 67; *Moor*, 762.

of that decision was not the circumstance of the damages being unliquidated, and said :²¹ “ We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort feors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other ; but for the purpose of this decision they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action. The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt ; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee. Another mode of considering this case is suggested by Bayley, B., in the case of *Lechmere v. Fletcher*.^{21a} If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt, barred against one, is barred altogether; the only exception now being, where one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined, and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment

²¹ 13 M. &

against one of two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly, and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

This decision has been followed in numerous cases. It not only survived the vigorous attack of Lord Penzance against its correctness and present application in *Kendall v. Hamilton*,²² but came out of that case with fresh, and what may be considered, as absolute authority. In that case, Lord Penzance spoke of that decision as merely enunciating a rule of procedure, which was opposed to general notions of justice, and practically unworkable, and based on technical grounds that were insufficient and unsatisfactory and lost all force with the abolition of the plea of abatement under the practice introduced by the Supreme Judicature Acts.^a The other Lords dissented

^a Lord Penzance relied on the case of *Rice v. Shute*²³ as deciding that a joint promise of several might give rise to a separate action against one only, and said: "The plaintiff upon a joint promise might bring and carry forward two actions *pari passu*, one against each of the joint contractors, and provided that neither of them chooses to plead an abatement (which they may have no object in doing, as it does not get rid of their liability) these actions may go on to judgment, and in neither of them, though the fact of the promise being joint only, and not joint and several, were to appear on the record, by bill of exceptions or otherwise, could the judgment be arrested or declared erroneous. Now if two judgments against two different defendants can be supported upon one joint promise, does not that show that there are in reality two causes of action involved in the breach of one joint promise, and, if so, the principle upon which *King v. Hoare* was decided, resting as it does upon the assertion that the joint promise gives rise to one cause of action and one only, cannot be sustained. The true position of the creditor would appear to be this: that he has a cause of action against either of his debtors separately or both together, subject to a plea in abatement. . . . By such a plea, either of the two joint contractors being sued alone, might insist upon the plaintiff bringing his action against both. But it is obvious that this right can only be exercised, on the part of both, by him who is first sued. If one of the two allows his liability to be enforced in a separate action, it is too late afterwards for the other, if sued, to plead in abatement, for he cannot give the plaintiff a better writ. The conduct of his co-contractor in permitting the plaintiff to go on to judgment against him alone, has rendered a joint action against the two impossible. The plaintiff has no longer a joint promise upon which to sue the two; the promise of one having passed into *res judicata*. . . . Assuming that the case of *King v. Hoare* was well decided in the then state of the law, a further and most important question, in the present action, appears to me to be this: Whether since the passing of the Judicature Act, and in a proceeding under that Act, such a defence as the present can be maintained. . . . It did away with all objections and defences arising out of the misjoinder or non-joinder of parties, either plaintiff or defendant. Since that Act no such thing as a plea in abatement is possible. The non-joinder of any party under any circumstances has ceased to be an answer, objection or defence to the action. In such a case the action goes on, and the Court or a Judge may, on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to

from that view, and concurring with the decision in *King v. Hoare* held that an unsatisfied judgment against two persons who had borrowed money from the plaintiff would bar a suit by him against a third person who was afterwards discovered to have been really interested as a partner with the two debtors in the business for the purposes of which the money had been borrowed.

Lord Cairns, L. C., said: "It is the right of persons jointly liable to pay a debt to insist on being sued together. If, then, there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But should he afterwards bring a further action against the third, that third may justly contend that the three should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is the objection of the third, and not of the other two. Nor is it any answer to him to say that whatever he pays on the judgment against himself he may have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, when the third is sued, and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action, this is equivalent to saying that he has disabled himself from suing the third in the way in which the third has a right to be sued. . . . I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting by means of a plea in abatement, to the non-joinder of a defendant

adjudicate upon and settle all the questions involved in the action, shall be added.' Now these provisions appear to me to have entirely altered the rights of joint contractors in respect of procedure. They have no longer any absolute right to insist that they should be sued together or not at all. The creditor may bring and pursue his action against one or more of them, and if the defendants desire that others should be joined, they must apply to a Judge, who will hear what is to be said on both sides and decide that additional parties shall, or shall not, be joined according to the requirements of justice, and not according to the election of the defendants, or any imperative rule that all who jointly contracted must be jointly sued. The joint contractor having thus lost the right (for it was a right, and an absolute one, though only a right of procedure) to be sued only in conjunction with his co-contractor, he can no longer be heard to maintain either that his co-contractor must be sued with him, or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged."

who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused, on the same principles on which a plea in abatement would have succeeded or failed." The other Lords concurred in that view, discussing with particularity the different aspects of the arguments of Lord Penzance against the decision in *King v. Hoare*,²⁴ Lord Hatherley adding that, "at this distance of time, after so much reliance has been placed from time to time, in other cases, upon the law as laid down in *King v. Hoare*, it cannot be now altered by a decision of your Lordship's house, the ordinary practice of which would require that which has been so long established as the law amongst mercantile men to be continued until it has been reversed by Act of Parliament."

ⁿ Lord Blackburn thus said : "From very early times it was the law that a contract was an entire thing, and that, therefore, all who were parties to the contract must, if alive, join as plaintiffs and must be joined as defendants. If this was not done there must be a plea in abatement. It has never, as far as I know, been doubted that the defendant might plead the non-joinder of his joint contractors in abatement, and in that way compel the plaintiff to join as defendants all who were parties to the joint contract and were still alive. But there was long a controversy as to whether the plea in abatement was the only way in which the objection could be raised. If on the evidence it was proved that the contract was joint, it was thought that there was a variance between the proof of a joint contract with the parties to the action, and some one not a party to the action and still alive, and the allegation in the declaration which, it was thought, must be taken to be an allegation of a contract between the parties to the action and no others, and consequently that there should be a non-suit or verdict for the defendant on the ground of variance. This, it has now been settled, is the law in cases where the objection is the non-joinder of a plaintiff; and consequently the non-joinder of a co-contractor as plaintiff was never in modern times pleaded in abatement. And it was long thought by many that the same course was open to a defendant. Such was the decision of Lord Holt and the Court of King's Bench in *Boson v. Sanford*.²⁵ I need hardly point out that if this had been still followed as law, it would have made it clear that the cause of action against the one was the same as that against all; or rather that there was no cause of action at all against the one alone, and never could be judgment against one alone; and so the point could never have risen. But it was established by a series of cases, which may be found collected in *Serjeant Williams'* note to *Cabell v. Vaughan*,²⁶ that though all the joint contractors must be joined as co-defendants, the only way of taking advantage of the non-joinder was by a plea in abatement. The first case, in which I find this decided, was *Rice v. Shute*.²⁶ The last in which I find it controverted, though unsuccessfully, was *Evans v. Lewis*,²⁷ in 1794. But though the mode of enforcing the joinder of all was thus out down, it still remained the law that all ought to be joined. I cannot agree in what seems to be the opinion of the noble and learned Lord (Lord Penzance) that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as defendants, or made it a mere matter of discretion in the court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed." Lord Selborne said : "Apart from authority, I should myself have thought it clear that, if the contract was joint only, the cause of action was the same. The rule established in *Rice v. Shute*,²⁸ on whatever principle it may have been founded, was (I suppose) applicable to all cases of actions against one (or less than all) of several joint contractors; and not only to partnership cases. Unless, therefore, that rule justifies the conclusion that all joint contracts are in law several, as well as joint, until survivorship takes place by the death of one of the contractors, I cannot see how it tends to prove that there are, in such cases, more causes of action than one upon the same contract. If that conclusion were sound, it is by no means clear to my mind, that

²⁴ 2 Salk. 440.

²⁵ 1 Wms. Saund. 200a.

²⁶ 5 Burr. 2611.

²⁷ 1 Wms. Saund.

²⁸ 5 Burr. 2611.

And those two decisions were held to be law, and their principle was held to apply in *Cambefort v. Chapman*,²⁹ in which case the plaintiff sold goods to a partnership consisting of the defendant and W., and after the dissolution of the partnership, but in ignorance of it drew bills for the price, which were accepted by W., in the partnership name, and a judgment recovered against W. was held to bar a subsequent suit against the defendant, it being alleged generally that an unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract.

291. And the main English rule may be considered as now settled in the United States also, except in South Carolina where the contrary view still prevails.³⁰ The contrary had been held by the United States' Supreme Court in *Sheehy v. Mandeville*³¹ in which case the plaintiff having sold goods to J, took his note for the amount of price, but afterwards suspecting that M. was a partner, sued both for the money, alleging that the note had been made by both trading under the firm name of J. In reply, M. pleaded that a judgment had been rendered on the note against J, but the plea was disallowed, Marshall, C. J., observing that "the doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be made against the others, which is not admitted) can be applied only to a case in which the original declaration

even a plea in abatement ought to have been allowed : nor can I imagine any reason why the same principle should not equally hold in the converse case, of an action brought by one of several persons *with* whom, jointly, a contract has been made ; in which case (whatever may have been the ground of the distinction) the rule has been that a plea in abatement was not necessary ; but that it was sufficient to make the defence of joint contract available, if the facts came out in evidence." Lord O'Hagan said : " As regards the operation of the principle recognised by the case of *King v. Hoare*, it does not seem to me that the Judicature Act meddles with that principle. The procedure is changed. The plea in abatement is abolished. The court is required to intervene where the parties to the action were formerly obliged to plead ; but it does not seem to follow that the change in the machinery of enforcement alters the rights to be enforced, or takes from the joint contractor any privilege which formerly belonged to him. It may be guarded in a different way, but I do not think it is abrogated by any express proviso or any necessary implication." As regards the necessity under the practice introduced by the Judicature Act of joining as defendants all the co-contractors, their Lordships' decision has been followed in *Pilley v. Robinson*³² by Stephen and Charles, J.J., who personally appeared, however, to entertain a contrary opinion.

²⁹ 19 Q. B. D. 229.

³⁰ *Collins v. Lemasters*, 31 Am. Dec. 469.
Treasurer v. Bates, 2 Bail. L. 362.

Union Bank v. Hodges, 11 Rich. 490.

³¹ 6 Cranch, 253.

³² 20 Q. B. D. 155.

was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract." This decision though often cited was followed in few cases and dissented from in a considerable number,³³ and was after all virtually overruled even in the Court which had pronounced it.³⁴ In *United States v. Price*,³⁵ Mr. Justice Grier speaking for the court said that it "goes no further than to decide that where a partner is sued severally on a joint or partnership contract, and judgment obtained against him, it is no bar to a suit against the other, because this contract was not merged in the judgment, and because the first judgment was founded on a several, not a joint promise." In *Ward v. Johnson*³⁶ the Supreme Court of Massachusetts held that in an action against two on a joint note, a judgment against one was a bar, and observed that the decision in *King v. Hoare* should be considered as well settled in the American Courts also.³⁷ In *Kennard v. Carter*,³⁸ the Indiana Supreme Court said: "A separate judgment taken against one of several joint makers of a note, in a suit to which the others are not parties, or in which suits are not taken to preserve the right to a subsequent judgment against such others, may be pleaded as a bar to a subsequent suit against those not included in the first suit or judgment." Similarly, the Supreme Court of Wisconsin in *Lauer v. Bandow*,³⁹ said: "It is perfectly well settled that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment therein against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and being indivisible it cannot be merged or cancelled as to one and existing and operative as to another joint debtor." Mr. Freeman says,⁴⁰ "Whenever two or more persons are jointly liable, so that if an action is commenced against any less than the whole number, the non-joinder of the others will sustain a plea in abatement, a judgment against any of those so jointly bound merges the entire cause of action. By taking judgment against one, he merges the cause of action as to

³³ *Wann v. Mc Nulty*, 43 Am. Dec. 58.
Kingsley v. Davis, 104 Mass. 178.
Root v. Dill, 38 Ind. 169.
People v. Harrison, 82 Ill. 84.
Wilson v. Buell, 20 N. E. R. 231.
Robinson v. Snyder, 74 Ind. 110.
Ferrall v. Bradford, 50 Am. Dec. 293.
Bonesteel v. Todd, 80 Am. Dec. 90.
³⁴ *Mason v. Eldred*, 6 Wall. 231.

Sessions v. Johnson, 95 U. S. 347.
United States v. Ames, 100 U. S. 35.
³⁵ 9 How. 83.
³⁶ 13 Mass. 148.
³⁷ *United States v. Ames*, 100 U. S. 35.
Bowen v. Hastings, 47 Wis. 232.
³⁸ 64 Ind. 31.
³⁹ 4 N. W. R. 774.
⁴⁰ Fr. Jud. 404.

that one, and puts it out of his power to maintain any further suit, either against the others severally or against all combined."⁴¹

The liability of partners for a debt due from the firm being generally considered joint, in the United States, it has often been held that if an abatement on account of non-joinder is not pleaded, and a judgment obtained against one or more of the partners, no further suit will lie.⁴² In *Exchange Bank v. Ford*,⁴³ a person brought a suit against three partners on a note, obtained judgment against two of them, continuing the case against the third, and afterwards amended the plaint, abandoning the claim upon the note and suing upon the original debt for which the note had been given; and it was held that the third partner might set up in bar of the suit the judgment recovered against the other two. If a judgment is passed on a confession of one member of a firm, his co-partners will neither be bound by the judgment, nor be liable to any other action upon the same liability.⁴⁴ A judgment against the known members of a partnership discharges the dormant members,⁴⁵ and the plaintiff's ignorance at the time when the first suit is brought of the other persons bound does not affect the application of the doctrine of merger.⁴⁶

292. The rule established by these decisions, though sometimes condemned, still retains its sway both in England and the United States, subject to certain exceptions and restrictions to which it has from time to time been subjected.⁴⁷ It is thus generally recognized that a judgment against a surviving partner does not bar proceedings against the estate of the deceased partner,⁴⁸ and it matters not which is first made liable, and this has been justified on the ground that "the joinder of a contract is severed by the death of one of the joint debtors."⁴⁹

N This exception was based on the ground of the peculiar doctrines of the English Courts of Equity, in the equitable machinery employed by which. Bowen, L. J., observed in *re Hodgson*, "It seems to me that there is sufficient flexibility to prevent injustice being done to other third parties; and I can see no reason for applying in all its fierce severity the doctrine of *res judicata*, if you can do complete justice without applying that doctrine." In that case all the Judges agreed upon the existence of that exception, though on somewhat different grounds. Sir James Hannen thought that it had been recognized even in *Kendall v. Hamilton*, and he cited with approval the observations of Lord Justice

⁴¹ *Jansen v. Grimshaw*, 125 Ill. 468.
Wilson v. Buell, 90 N. E. R. 231.
Lauer v. Bandow, 48 Wis. 638.
⁴² *Averill v. Loucks*, 6 Barb. 19.
Orosby v. Jeroloman, 37 Ind. 276.
 3 De G. & J. 33.

⁴³ *North v. Mudge*, 81 Am. Dec. 441.

⁴⁴ Fr. Jud. 405.

⁴⁵ *Moale v. Hollius*, 33 Am. Dec. 684;
Robertson v. Smith, 9 Am. Dec. 227.
Smith v. Black, 11 Am. Dec. 686.

⁴⁷ *Id.* 27 L. J. Bank. 29.

⁴⁸ *In re Hodgson*, 31 Ch. D. 177.
Devol v. Halstead, 16 Ind. 237.

⁴⁹ *Wells Res. Jud.* 36.

It is also generally agreed upon that where a suit was brought against two joint promisors, but proceeded

Cotton, who in that case had said: "It is now well established that a Court of Equity does treat the estate of a deceased partner as still liable to the partnership creditors, though at law the survivor has become solely liable. And it must now be considered as established that the partnership creditor may obtain relief against the estate of the deceased partner without having exhausted his remedy against the survivor. . . . It is unnecessary to go through the numerous cases which were cited during the argument, but it will be right to refer to the cases of the *Liverpool Borough Bank v. Walker*⁵⁰ and *Jacomb v. Harwood*,⁵¹ as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in Equity against the estate of a deceased partner. But in each of those cases the judgment was not recovered until after the death of the partner, against whose estate the creditor was seeking relief; and the cases, in which relief has been given in Equity against the estate of a deceased partner, certainly establish that from and after his death his estate is subject to a separate or several liability." Sir James Hannen added: "Now this view of the law is adopted by almost every member of the House of Lords who took part in the affirmation of the decision. It is stated by Lord Cairns, by Lord Hatherley, by Lord Selborne, and by Lord O'Hagan, and finally by Lord Blackburn, who says that he had been convinced in the course of the argument, by Mr. Rigby that that was the law; and it would be impossible for us to resist such a *consensus* of opinion of such high authorities as these. We come, therefore, without any hesitation, to the conclusion that this is the correct view of the law. It was argued here that there was a difference between this case and the cases cited, inasmuch as the judgment recovered, or that which is said to make the transaction a *res judicata*, namely, the proof against the estate of the son *John*, took place before the action was brought against the surviving partner *James*; but we are of opinion that that difference in the order of events can make no difference in the principle. What is clearly established by the decision which I have referred to is this, that in the case of a deceased partner there is a concurrent remedy against his estate and against the surviving partner, and we can see no reason why the order of events, where several remedies are pursued, can make any difference as to the liability of the assets of the surviving partner." Bowen, L. J., on the other hand, said: "That *Kendall v. Hamilton* has nothing to do with the pursuit of a remedy against the estate of a deceased partner. An attempt had been made *inter viros* to extend beyond what was legitimate the doctrine that partnership debts are joint and several. . . . It appears to me that Equity, although it allows the pursuit of a remedy against the estate of a deceased partner, does not consider the debt of the deceased partner as a joint and several debt, but only gives the right to pursue the remedy of a joint debt as if it were a several debt so far as the rights and liabilities of the other joint debtors are not disturbed or prejudiced. It seems to me that Lord Selborne's language really shows that that is the true view. He says: 'As in several other well-known classes of cases (of which mortgages and security-bonds, with penalties, may be taken as examples), equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls, *inter mercatores*, the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in Equity it is taken as still subsisting, for every purpose of liquidation, just as if it had been dissolved *inter viros*, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several, by the dissolution, and by the exclusion in Equity of the survivorship which takes effect in law.' It seems to me that Equity, although displacing the effect of survivorship when there is a death, would never give such effect to the death of one man as to prejudice the rights of another, and ought only to regard the effect of death as converting a joint into a several debt so far as the interests of the other joint-debtors are not prejudicially affected. . . . Taking those two cases (*Liverpool Borough Bank v. Walker*,⁵⁰ and *Hills v. M'Rae*⁵²) together, the result appears to me to show that the debt is still to a certain extent a joint debt, and as Lord Justice Cotton has expressed it, that Equity recognize it as a joint debt, though it will allow the separate remedy." In support of the same view, Fry, L. J., said: "It appears to me that the Court of Chancery and the Chancery Division of the High Court have enforced the remedies against the estate of a deceased partner subject to two conditions. In the first place, they have required that partnership debts shall be postponed to the separate debts. The second condition is this,—the Courts have required the presence of the surviving partner in some method, shape, or manner, at the taking of the accounts of the partnership."

⁵⁰ 4 De. G. & J. 24.
⁵¹ 2 Ves. Sen. 206.

⁵² 4 De. G. & J.
⁵³ 9 Hare, 297.

to decision against one only, as the other could not be found; the decision will not bar a subsequent suit against that other, as there could be no election in such a case to proceed against one for a discharge of that other.⁵⁴ Mr. Wells thus says: "It has been held that the absence from the jurisdiction of some of the joint debtors will, from the necessity of the case, justify proceeding against those within the jurisdiction, so that the security of the absentees will not be lost, but a subsequent suit may be brought against them."⁵⁵⁵⁶ As a general rule, an unsatisfied judgment against one joint promisor is no bar to a suit against the other who was at the time of the prior suit out of the country and a non-resident.⁵⁷ Thus Mr. Black says: "It is well settled that an unsatisfied judgment against one of two joint debtors does not bar a subsequent action upon the original claim against the other, where the latter, at the time the first suit was brought, was without the jurisdiction of the State and consequently beyond the reach of legal service; in such a case it stands in the same situation as where judgment has been rendered in a suit against one party to a joint and several contract."⁵⁸ For an instance of another exception reference may be made to the case of *Badeley v. Consolidated Bank*,⁵⁹ in which Stirling, J., held that the rights of a surety against his principal not being identical with those of the creditor, a decision obtained by the creditor against one of the principal debtors would not bar a suit by the surety against a joint debtor.

293. The propriety of the application of this doctrine in this country has been much doubted, and eminent Judges have expressed their apprehensions as to its being productive of hardship here.⁶⁰ The doctrine has, however, been adopted, and the decision in *King v. Hoare* is judicially recognized as a binding authority even by the highest courts in this country, at least, in cases falling within the original jurisdiction of the Presidency High Court. Thus

⁵⁴ *Olcott v. Little*, 9 N. H. 259.
⁵⁵ *Tappan v. Buren*, 5 Mass. 196.

⁵⁶ *Olcott v. Little*, 9 N. H. 261.

⁵⁷ *Wells Res. Jud.* 37.

⁵⁸ *Tibbetts v. Shapleigh*, 60 N. H. 487.

⁵⁹ *Merriman v. Baker*, 22 N. E. R. 992.

Yoho v. McGovern, 42 Ohio, 11.

West v. Furbish, 67 Me. 17.

⁶⁰ 34 Ch. D. 536.

Hemendro Coomar v. Rajendrolall,
 I. L. R. III Cal. 363. Per Markby, J.

in *Hemendro Coomar v. Rajendrolall*⁶¹ the question was whether an unsatisfied decree obtained against one of the partners on a joint promissory note executed by all the partners would bar a suit brought upon it against the remaining partners, and it was conceded that the question was to be determined by the English law of contracts, except so far as the same might have been modified by the Indian Contract Act. Mr. Justice Markby said: "I think it impossible to deny that, under the English law, this suit would have been barred, and notwithstanding the great authority of Mr. Justice Willes, who seems to think otherwise, I should say, not as a mere rule of procedure, but upon principle of the Law of Contract. If this were a mere matter of procedure, the English law would not necessarily bind us. But I understand Parke, B.'s judgment in *King v. Hoare*, which is the leading authority, to rest upon this that, under a joint contract to pay a sum certain, there is but one single obligation which may indeed be enforced severally, but can be enforced once only. . . . Of course, in all questions of this kind, the liability must depend ultimately upon the intention of the parties; but I consider that it is now finally settled by the law of England that, a joint promissory note creates an obligation which can be sued on once only. Mr. Hill contended that Sec. 43 of the Contract Act did away with the rule that the second suit was barred in such a case as this. But that section does no more than place the liability arising from the breach of a joint contract and the liability arising from a tort upon the same footing,—that is to say, that each wrong-doer is liable to be separately sued in respect of the whole liability. But it does not touch that which has been determined to be the nature of the obligation created by the breach of contract,—namely, that it is one which can be sued on once only. I have searched into this matter with some care in order to see if the rule laid down in *King v. Hoare* was really binding upon us, because if it was not, I think it would require some consideration how far it is desirable that in such a case as this a note made by an ordinary trading partnership, the second suit should be barred. The rule laid down by Parke, B., in *King v. Hoare* is very likely correct in theory. . . . As it is, however, I am bound to follow that decision, and to hold that this being a case governed by the English law, the learned Judge

(Kennedy, J.) was right in dismissing the suit." This decision was followed by the Madras High Court also on the Original side in *Gurusami v. Samurti*,⁶² in which a suit against a father for a family debt was held to bar a suit for the unsatisfied portion of the same debt against the undivided sons; and Mr. Justice Muttusami Ayyar said:—"At its inception each obligation was single and indivisible, though it was enforceable jointly against the father and the sons or against any of them, but the plaintiff was entitled to sue upon it but once, and, as he elected to sue one of the debtors only, it was exhausted and merged in the judgment against the father. . . . The test seems to be whether, according to the intention of the parties, a single obligation was created as against all the debtors or whether a separate obligation was created against each of the several debtors."

In the *mofussil* cases, the question of the authority of the English decisions has never been formally decided in the affirmative. Those decisions have been cited in some cases as binding authorities, but no opinion was expressed in regard to their force as such, as they were distinguished on other grounds. In *Dhunput Sing v. Sham Soonder*⁶³ and in *Lawless v. Calcutta L. & S. Co.*,⁶⁴ they were distinguished on the ground that the liability in those cases was not joint, but joint and several; Wilson, J., having observed in the latter case: "There is no trace in this case of a joint liability, the claim against S. was as banian, and the claim against L. is as manager, and, as such, liable for sums which came to his hands. The liability was not joint, (but it) is distinct."

In *Bhukhandas v. Lallubhai*⁶⁵ also, the subsequent suit was held not to be barred, on the ground that the defendant's liability was joint and several, and Bayley, O. C. J., only incidentally observed, in delivering the judgment of a Division Bench of the Bombay High Court, that "the case of *King v. Hoare*, which was treated as a binding authority in the case in the House of Lords of *Kendall v. Hamilton*, does not appear to have been cited, or to have been present to the mind of the District Judge when he was preparing his judgment." In *Nobin Chandra v.*

1. L. R. V Mad. 37.
1. L. R. V Cal. 291.

64 I. L. R. VII Cal. 627.

65 I. L. R. XVII Bom. 562.

a Dassya,⁶⁶ a decree was obtained for recovery of a debt from joint property pledged therefor against only one of its two owners, and on an objection in execution proceedings by the other owner in regard to his share being successful, a suit against him was held not to be barred, and Sir Richard Garth, C. J., in delivering the judgment of the court said: — “If the only object of the suit had been to charge the defendant No. 1, with the same liability as was charged upon the defendant No. 2 by the former decree, it would have been open to the objection upon which the case of *Kendall v. Hamilton* and the other cases which were cited during the argument were decided. But it was by no means the only object of the suit to fix the defendant No. 1 with that liability. That undoubtedly is the subject of the first prayer in the plaint. But the second prayer is, that the order of the 3rd of May 1881 (in the execution proceedings) may be set aside, and that the whole of the mortgaged property may be declared liable to be sold in execution of the former decree obtained against the defendant No. 2. This claim (except so far as it seeks to set aside the order of the 3rd of May) is a perfectly legitimate one, and is not open to the objection which is fatal to the first claim.” This decision was followed by the Madras High Court in *Raman v. Sridharan*,⁶⁷ in which in similar circumstances, a decree in a prior suit against three of the *uralors* of a *Malabar devsom* declaring the property of the *devsom* liable for the claim was held not to bar a suit for a declaration that the judgment-debt was binding on the *devsom* and upon the fourth *uralar* who was not a party to the former suits. Nor does there appear to be sufficient reason why the rule of the English decisions should be held binding in this country, as they were based mainly on precedents grounded on the English Common Law as to the technical plea of abatement which has long since been repealed there and never had authority in this country, at least outside Presidency towns; especially as under Sec. 43 of the Indian Contract of 1872, even in a suit brought upon a contract made by a firm, the plaintiff may select as defendants any partners of the firm against whom he wishes to proceed, allowing his right of suit against others to be barred by Limitation Law.⁶⁸

⁶⁶ I. L. R. (X Cal.) 924. | ⁶⁷ I. L. R. XVI Mad. 449. | ⁶⁸ *Vide* *Lakmidas v. Purshotam*, I. L. R. VI

In *Ramnath Roy v. Chunder Sekhur*,⁶⁹ Jackson and Trevor, J. J., held that a suit against the obligor of a bond would not bar a subsequent suit brought to enforce the joint liability of his brothers on the ground of the loan having been made for the interests of the family; and the decision was based directly on the ground that the cause of action in the two suits was not the same; Trevor, J., having said: "In the first the non-payment by C. was the cause of action; and he was the sole defendant; in the present the non-payment by all the persons who are defendants is the cause of action and the four brothers are defendants. . . . The plaintiff is quite at liberty to try to make that a joint liability against all the brothers in the present suit, which he made only a several liability against C. in the first." Steer, J., dissented from the decision on the ground of the identity of the cause of action, but did not refer to any English or American decision in support of his view. Nor were any of the decisions referred to in *Nuthoo Lall v. Shoukee Lall*, in which in similar circumstances a decree on a mortgage-bond against the obligors was held to bar a suit for the unsatisfied portion of the decree brought against their undivided brothers on the ground that the loan for which the mortgage-bond was given had been taken for, and on behalf of, the family, and Sir Richard Couch, C. J., in delivering the judgment of the Court expressed his dissent from the decision in *Ramnath Roy v. Chunder Sekhur*,⁷⁰ and said: "If there be a joint contract, not a joint and several but a joint contract—and that is all this can be—and the party sues upon it and gets judgment, he cannot bring a fresh suit against the parties who were jointly liable, but were not included in the former suit."

294. In England the same rule is held to apply in the case of suits on torts. Thus, in *Brinsmead v. Harrison*, the defendant alleged by way of plea that an action had been brought for the same cause against another wrong-doer, and a judgment obtained against her, which remained in full force, and the Court of Common Pleas held that the judgment, even without

Bar for jointness applies to joint tort-feasors in England and India.

satisfaction, was a bar. On appeal,⁷¹ Kelly, C. B., said that there was no authority against that view, and that, if the plea "were held not to be a defence, the effect would, in the first place, be to encourage any number of vexatious actions wherever there happened to be several joint wrong-doers. An unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs, if judgment against one of them did not operate as a bar to proceedings against the others. The mischief would not even rest there. Judgment having been recovered against one or more of the wrong-doers, and damages assessed, if that judgment afforded no defence, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy? There are other grounds upon which it would be extremely inconvenient and unjust if a second action could be maintained. In the absence, therefore, of authority to the contrary, and upon principle, and also upon what I conceive to be binding authorities in its favour, I come to the conclusion that such a plea as this affords a good defence." After referring to the decisions in *Brown v. Wootton* and *King v. Hoare*, the Chief Baron added, "There being, then, this series of authorities, satisfactory of themselves, and having the sanction and approval of Chief Baron Comyns and Lord Wensleydale, notwithstanding the respect we entertain for the opinions and decisions of the American Courts, where a different view of the law seems to be entertained, I think we are bound to follow those of our own Courts, and to hold that, upon principle as well as upon authority, this plea is a good answer to the action." Blackburn, J., further said: "I find no dictum of authority and no decision the other way. If this were *res integra*,⁷² I should have considered the American case referred to⁷³ entitled to great respect. But for the reasons given by the Court in *Brown v. Wootton*, which works no injustice, and which has been acted upon for centuries, although no decision of a Court of Error has been pronounced upon it, I think we are bound, even sitting in a Court of Error, to decide in conformity with it." Lush, J.,

⁷¹ L. R. 7 C. P. 547.⁷² *Livingstone v. Bishop*, 1 John. U. S. 200.⁷³ *Lovejoy v. Murray*, 3 Wall. 1.

further observed: "The judges who decided those American cases seem to have thought that, by holding that recovery against one of two wrong-doers was a bar to an action against the other, they would be deciding that the property in the chattel passed by the recovery, but I do not think that by any means follows."ⁿ

The same view has been adopted in this country. Thus, in *Rahmubhoy v. Turner*,⁷⁴ Mr. Justice Scott said: "From the following cases—*King v. Hoare*; *Buckland v. Johnson*; *Brinsmead v. Harrison*; *Kendall v. Hamilton*; *Cambefort v. Chapman*, it appears to be settled law that a judgment recovered against any one of several joint debtors merges the remedy for the joint debt, and is

* The theory of the transfer of the title to personal property by the passing of a judgment for damages for its misappropriation by the defendant was advanced in England in *Adams v. Broughton*,⁷⁵ and on its authority by Jervis, C. J., in *Buckland v. Johnson*.⁷⁶ It was strongly negatived, however, in *Brinsmead v. Harrison*, though the final decision in that case turned on another ground. In the Court of Common Pleas, Willes, J., after showing that the observation as to the transfer of the title was not necessary for the decision in either of the cases said: "On the other hand, there is a series of decisions shewing that a mere recovery, without satisfaction, has not the effect of changing the property. In Jenkins, 4th Cent. Case 88, it is said: 'A., in trespass against B. for taking an horse, recovers damages; by this recovery, and execution done thereon, the property of the horse is vested in B. *Solutio pretiiemptionis loco habetur*.' That doctrine is acted upon in *Cooper v. Shepherd*;⁷⁷ and, though the marginal note treats the recovery as changing the property,—a doctrine thrown out also in the note to *Barnett v. Brandao*,⁷⁸—the plea shews that the damages were satisfied; and the judgment of Tindal, C. J., shows that the property vests in the defendant only 'on payment of the damages.' To the same effect are the observations of Holroyd, J., in *Morris v. Robinson*.⁷⁹ 'Where in trover,' he says, 'the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover.' To the same effect is the note in 2 Wms. Saund. 47 c c, n. (z). It may also be proper to refer to the note to the case of *Holmes v. Wilson*⁸⁰ in which the law is stated by the reporters probably at the suggestion of one of the judges." On appeal, Mr. Justice Lush, expressed his concurrence with that view, and Mr. Justice Blackburn felt inclined to do that. In *Drake*,⁸¹ the Court actually held the same, and Sir George Jessel, M. R., said: "After the decision in *Brinsmead v. Harrison*, we are bound to hold that the property was never divested from Drake. He had the property, unless something which he did under the judgment divested it from him. It is clear that the judgment itself did not divest the property. Did the execution divest? Upon that question the authority of *Brinsmead v. Harrison* is distinctly in point. It shews that the execution does not divest the property unless there is satisfaction of the judgment. There are several ways in which an execution might produce nothing. One way would be if the amount produced by the sale of the goods seized did not cover the expenses of the sale. Another way would be if, as happened in the present case, there was a prior act of bankruptcy which nullified the execution. The judgments in *Brinsmead v. Harrison*, and especially that of Mr. Justice Willes, show that the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant. The plaintiff wants to get his goods back, and the court gives him the next best thing, that is, the value of the goods. If he does not get that value, then he does not lose his property in the goods." These decisions have been followed in this country also, where the same view has been taken by the High Courts at Calcutta⁸² and Bombay⁸³

I. L. R. XIV Bom. 416.
3 Str. 1078; Andr.
15 C. B. 145.

74 3 B. & C. 196.

75 10 Ad. & E. 511.

76 5 Ch. D. 966.

77 *Harris v. Harris* I. L. R. 1 Cal. 395.

78 *Balvant v. Babaji*, I. L. R. VIII Bom. 602.

a bar to an action against a co-debtor upon the joint liability, and, similarly, in a matter of *tortfeasance* a judgment against one of several wrong-doers is a bar to an action on the same matter against the others. *Brinsmead v. Harrison* settled the point that, after recovering judgment against one wrong-doer, a plaintiff cannot sue the other for the same matter, even if the judgment in the first action remains unsatisfied. In *Bigelow on Estoppels*⁸⁴ the principle is thoroughly discussed, and it appears that American law now follows *King v. Hoare* in questions of joint debtors, although it holds joint wrong-doers to a joint and several liability. The rule of *King v. Hoare* applies in both respects in India. Section 43 of the Contract Act IX of 1872 is not perhaps quite clear whether a complete adoption from the English rule is intended. But the Calcutta Court (*Hemendro Coomar v. Rajendrolall*) has distinctly followed the English law, and I shall do the same, and hold that such of the wrongs alleged in this suit as were of a joint character and were adjudicated upon in the last suit were extinguished by the former judgment."

295. Some American decisions also followed the English rule;⁸⁵ but, as observed by Mr. Black,⁸⁶ Bar for jointness does not apply in case of torts in the United States. "It is settled by the vast preponderance of authority in this country, that where several persons engage in the commission of a trespass, their liability is not merely joint, but joint and several, and the plaintiff may maintain his action against one or more or all of them; and consequently a judgment recovered against one of the joint trespassers, but not satisfied, is no bar to other actions for the same trespass against the others."⁸⁷ In *Livingston v. Bishop*,⁸⁸ Chief Justice Kent expressed his dissent from the decision in *Brown v. Wootton*, and said: "The case of *Brown v. Wootton* was clearly introductory of a new rule. It is laid down in *Brooke, Judgment*, pl. 98 that if two commit a trespass, I can have several actions against them, and recover the entire damages against each, and have execution; and one defendant cannot

⁸⁴ Vide pp. 104-110, 4th Ed.

⁸⁵ *Hunt v. Bates*, 82 Am. Dec. 592.

Wilkes v. Jackson, 2 Hen. & M. 355.

⁸⁶ Bl. Jud. 938.

⁸⁷ *Jones v. Lowell*, 35 Me. 541.

Elliott v. Hayden, 104 Mass. 180.

Savage v. Stevens, 128 Mass. 254.

v. Plymale, 100 Am. Dec. 752.

Jack v. Hudnall, 18 Am. Rep. 298.

Fleming v. McDonald, 19 Am. Rep. 711.

United Society v. Underwood, 21 Am. Rep. 214.

Turner v. Hitchcock, 20 Iowa, 310.

⁸⁸ 3 Am. Dec. 330.

plead that the plaintiff hath recovered against the other for the same trespass and taken him in execution. And in Morton's case, Cro. Eliz. 30, it was even made a question by one of the judges whether a judgment and execution, with satisfaction, against one joint trespasser, could be pleaded by another trespasser, but the court held it reasonable that it should be a bar. And many cases subsequent to that of *Brown v. Wootton* seem to disregard it, and to make the satisfaction against one trespasser the test of the plea. Thus in *Cocke v. Jenner*,⁸⁹ the court held that if trespassers be sued in several actions, the plaintiff may make choice of the best damages, but that when he has taken one satisfaction, he can take no more, and if he attempt it, an *audita querela* will lie. Again in the case of *Corbet v. Barnes*,⁹⁰ the court said that for one assault the plaintiff can have several actions and recover, but when recovery is had against one, and satisfaction, the plaintiff cannot have a second satisfaction, any more than where separate suits are brought upon a joint and several obligation. So late as the case of *Bird v. Randall*,⁹¹ Lord Mansfield advanced the same doctrine, and observed that, in case of a joint trespass, the defendants were all liable to the plaintiff and he might proceed against any or all of them as he pleased, yet he shall have but one satisfaction from them all. I am therefore inclined to question the extent of the decision in *Brown v. Wootton*, and to hold that a recovery against one joint trespasser is not alone a bar to a suit against another." In *Wright v. Lathrop*,⁹² the Supreme Court of Ohio said, "That each joint trespasser is answerable for the act of all, and that the plaintiff may pursue his remedy against one or all, is unquestioned. He is entitled to a compensation in damages for the injury he sustained by the commission of the trespass. This compensation he may recover from one or all of the joint trespassers. His remedy against them severally is concurrent, and they are *quasi* collateral security for each other, until the plaintiff has obtained satisfaction. It would seem to follow from this doctrine that a recovery of a judgment against one joint trespasser would be no bar to a suit and recovery against another. If a judgment against one of several joint trespassers is of itself a bar to all legal proceedings against the others, it will, in a great degree, deprive the plaintiff of his right of bringing several suits, and of his election *de melioribus damnis*, as each defendant, except in the suit first tried, may plead *puis darrein continuance* the recovery

⁸⁹ Hob. 66.
⁹⁰ Wm. Jones, 377.

⁹¹ 3 Burr. 1345.
⁹² 15 Am. Dec. 7

in that suit as a bar to the plaintiff's further proceeding, thereby limiting the plaintiff to the recovery of a single verdict, and subjecting him to the payment of costs in all the suits but the one first tried." In *Lovejoy v. Murray*,⁹³ Mr. Justice Miller, in delivering the judgment of the United States Supreme Court, stated two propositions as conceded by all the authorities, namely: "(1) Persons engaged in committing the same trespass are joint and several trespassers and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may all be sued in one action, or one may be sued alone, and cannot plead the non-joinder of the others in abatement; and, so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages. (2) No matter how many judgments may be obtained for the same trespass, or what varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, and is a bar to any other action for the same cause." The satisfaction, however, to have this effect must consist of an actual payment of the amount adjudged for damages.⁹⁴ Mr. Freeman further points out that the argument used by Kelly, C. B., in *Brinsmead v. Harrison* was one not of principle, as for that it must be shown that the cause of action is joint, and not joint and several; but that it had reference only to considerations of hardship and inconvenience.⁹⁵

In *Stone v. Dickinson*⁹⁶ the character of a tort as joint or several was discussed, and Chief Justice Bigelow said: "The alleged trespasses on the person of the plaintiff were simultaneous and contemporaneous acts, committed on him by the same person acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful and unlawful act committed by a common agent acting for several and distinct principals. It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers by whom the tortious act was done were the agents of several different plaintiffs who, without pre-concert, had sued out separate writs against him. The measure of his indemnity

⁹³ 3 Wall. 1.

⁹⁴ *Sheldon v. Kibbe*, 3 Am. Dec. 176.

⁹⁵ Fr. Jud. 412.

⁹⁶ 81 Am. Dec. 727.

cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done so as to entitle the party injured to a compensation graduated, not according to the damages sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him and caused him to be arrested and imprisoned cannot be regarded as co-trespassers, because it does not appear that they acted in concert or knowingly employed a common agent. Such pre-concert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and if of many, whether they acted with a common purpose and design in which they all shared, or from separate and distinct motives, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, nor the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*. But there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages when it appears that he has suffered the consequence of a single tortious act only.....No one would say that he could recover satisfaction from each of the persons liable to an action. When the damages suffered by him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others. The law will not permit a party to receive anything more than a compensation for an injury. Where there has been only one wrongful act, there can be but one full and complete indemnity. When that is obtained, the party injured has exhausted his remedy." Mr. Wells has expressed a strong dissent from that view, and said: "To me at least, it is quite inconceivable that there can be a joint liability created without a joint act, or that there can be a joint act without any concurrence

of will, or purpose, or any concert or voluntary combination of effort or movement tending designedly to a common end. Surely, it must be so that in every compound trespass, so to speak, there must be as many trespasses as there are independent acts, and as many independent acts as there are independent actors. Now take the case, wherein the decision was rendered, and we find nine different person acting independently in taking out writs and having them executed without any union of purpose or concert of plan or pursuit. The elements of simultaneous time, sameness of the agent, and accidental coalescing in the result are not sufficient to make the actions or the trespasses joint. . . . In reality the trespass was in suing out the writs unlawfully, which led, in the regular operation of the act, to the consequence of imprisonment. If the suing out of the writs was unlawful, the consequence was unlawful, otherwise not. Nor am I able to see anything incongruous in the supposition that a nine-fold exaggeration might result by taking out and executing nine different writs which deprived the plaintiff of his personal liberty for years. In this, the damages are, of necessity, exemplary, and not regulated by any standard of value, such as there is in the case of an attachment of a horse, cited as an illustration by the court. . . . The long imprisonment endured by the plaintiff justifies the supposition that the combination of writs did proportionately exaggerate the trespass. The contemporaneousness thereof would, of course, make the estimation of damages difficult, but this difficulty could not make the accidental coalescing of results a joint trespass. As to the officer he would be protected by the process of the court, unless it were void on its face. But if he wilfully and knowingly received and executed void writs to oppress the judgment-debtor, I see no reason why he should not be made to pay just damages for each illegal writ he put into execution, and so be made to pay nine times as much for nine as he would for a single one."⁹⁷

It has been held in the United States in some cases that taking out execution against one tort-feasor will bar a suit against the others joint with him in the tort.⁹⁸ The weight of authority is, however, against that view,⁹⁹ which was attempted to be established only on the ground of election. But if mere

⁹⁷ Wells, Res. Jud. 48-50.

⁹⁸ Fleming v. McDonald, 19 Am.
Smith v. Singleton, 39 Am. Dec. 122.

Livingstone v. Bishop, 8 Am. Dec. 330.
Blann v. Crocheron, 54 Am. Dec. 208.
McVey v. Marratt, 60 Iowa, 122.

election to pursue one trespasser were binding on the plaintiff as a release of all the co-trespassers, that election must be as obvious when the suit is prosecuted to final judgment as when the plaintiff takes the first step towards its enforcement. If, on the other hand, such election does not involve the several causes of action against the other trespassers prior to the issuing of an execution, it is difficult to perceive why or how that event necessarily involves them." Mr. Freeman says: "How vain and delusive that law must be which declares the right of an injured party to proceed severally against every person concerned in committing an injury; which sustains him until the liability of every wrong-doer is severally determined and evidenced by a final judgment; and which, after thus 'holding the word of promise to his ear, breaks it to his hope,' by forbidding him to attempt the execution of either judgment, upon penalty of releasing all the others. Plaintiff can have but one satisfaction for each trespass, whether he has recovered several judgments or none. Such satisfaction abates all actions pending, and discharges all judgments obtained, against co-trespassers,¹⁰⁰ except as to costs, which it seems may be collected upon each judgment.¹ Pursuing trespassers, or any of them severally, is a conclusive election to consider the trespass as several, and is a bar to a joint action subsequently instituted."²

An exception has also been attempted to be made in the United States, in regard to the suits for the value of property injured or recovered, on the ground that the judgment in such a case vests the title to the property in the defendant, "that as it would be unjust for the defendant to acquire title to the property taken or injured, while others might be made to pay the entire value thereof in a subsequent action, the plaintiff could not be allowed to proceed against any person concerned in the trespass or conversion and not included in the first action."³ But the American Courts, like the Courts in England and India, are now agreed that the mere judgment does not vest the title to the property in the defendant, that the title is transferred to the defendant only when the judgment is satisfied, and that until such payment, there is no obstacle to prevent him from seeking redress in the courts against any one origi-

¹⁰⁰ *Matthews v. Lawrence*, 43 Am. Dec. 665.

Savage v. Stevens, 128 Mass. 254.

Luce v. Dexter, 135 Mass. 22.

¹ *Ayer v. Ashmead*, 83 Am. Dec. 154.

N. B. v. Piano Co., 45 Ind. 5.

² *Murray v. Lovejoy*, 2 Ciff. 191.

Smith v. Rines, 2 Sum. 348.

³ *Floyd v. Browne*, 18 Am. Dec. 602.

White v. Philbrick, 17 Am. Dec. 214.

nally liable.⁴ But when the judgment has been paid, the title to the property is, for most purposes, vested in the defendant by relation at the date of the conversion. The plaintiff elects by his proceeding against the defendant to compel the latter to become a purchaser of the property and to pay its value at the date of the conversion. When the plaintiff has succeeded in compelling this involuntary purchase and payment, the title thereby acquired by the defendant relates back to the date of the conversion, because that is the period at which the plaintiff has chosen to treat the property as purchased from him by the defendant.⁵

B.—BAR IN THE SAME SUIT.

Reference has been made in Chapter II⁶ to a principle analogous to that of *res judicata*, under which a decision in a prior stage of a civil suit or other proceeding in regard to any point, is held to be a bar to a fresh decision on that point in all the subsequent stages of that suit or proceeding. The principle has most often come into application in execution proceedings. The leading decision on the subject is that of *Mungul Pershad Dichit v. Grija Kant Lahiri*,⁷ in which an order of the attachment of the judgment-debtor's property, on an application for the execution of a decree, was held to bar the contention in a subsequent stage of the execution proceedings that the said application was barred by Limitation Law, and on that account could not revive the period of limitation for a subsequent application. Sir Barnes Peacock in delivering the decision of their Lordships of the Privy Council said: "The Subordinate Judge had jurisdiction upon the petition of the 8th October 1874 to determine whether the decree was barred on the 8th October 1871, and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff,

⁴ *Spivey v. Morris*, 52 Am. Dec. 224.
Elliott v. Hayden, 104 Mass. 180.
Smith v. Smith, 50 N. H. 219.
McReady v. Rogers, 93 Am. Dec. 323.

St. Louis Ry. Co. v. McKinsey, 22 Am. St. 54.
⁵ *Hepburn v. Sewell*, 9 Am. Dec. 512.
⁶ *Vide Supra*, §. 24.
⁷ L. R. VIII., I. A. 123.

his decree is valid, unless reversed upon appeal; and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation."

This decision has been followed repeatedly at their Lordships' Board as well as by the High Courts in India. Thus, in *Ram Kirpal v. Rup Kuari*,⁸ a District Judge decided that a certain decree he was executing had awarded future mesne profits, and the decision was not appealed against; and their Lordships of the Privy Council held that no court could after that decide that the decree had not awarded future mesne profits. Sir Barnes Peacock, in delivering their Lordships' judgment, said: "It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution." On the same principle, their Lordships in *Beni Ram v. Nanhu Mal*,⁹ held that an order to the effect that the amount of a decree was under the terms of the decree payable with interest would bar the raising of the same question as to the interest in subsequent execution-proceedings.

In India, the case of *Bandey Karim v. Romesh Chunder*¹⁰ was the exact converse of the leading decision, and Field, J., in delivering the judgment of the Calcutta High Court, after referring to it, said: "By the same course of reasoning, inasmuch as the Subordinate Judge decided on the 5th of March 1881 that the decree was then barred by Limitation, and as that order has become final, the decree-holder cannot now, upon the application of the 7th of April 1881, be heard to say that it is not barred by Limitation." The facts of the case of *Manjunath v. Venkatesh*¹¹ were similar to those of the above case, and the Bombay High Court held that a decision as to a certain application for execution being barred by Limitation would bar a plea in the subsequent stages of the execution-proceedings as to that application not having been so barred. Mr. Justice Melvill, in delivering the judgment of the High Court, after observing that the leading decision would alter the contrary practice that had prevailed before,¹² said: "This

⁸ L. R. XI I. A. 37.

⁹ L. R. XI I. A. 181.

¹⁰ I. L. R. IX Cal. 65.

¹¹ I. L. R. VI Bom. 54.

¹² *Vide* Gopal v. Ganeshdas, VIII B. H. C. R. A. C. J. 97.

Biseshur Mullick v. Mahatab Chunder, X W. R. F.B. 8.

(Privy Council) judgment goes no further than to ascribe the effect of *res judicata* to a decision, whether express or implied, that an application is not time-barred. But it seems to be a necessary conclusion that the same effect must be given to a decision that an application is time-barred. If a decision be valid and binding, although it may be erroneous, when it is given in favor of one party, it cannot be less so when it is in favor of the other party It appears to us that it would be anomalous, and, we may add, inconvenient and unjust, if a judgment-creditor, whose decree had been declared by a subordinate, but competent, court to be time-barred, and who had acquiesced in such decision, or had failed to get it reversed in appeal, were to be allowed to go again to the Subordinate Court with another application for execution, and ask that Court to determine that the previous decision, though perhaps confirmed by the High Court or Privy Council, was erroneous and of no effect." In *Chathuppan v. Pydel*,¹³ the Madras High Court held that a decision in prior execution-proceedings as to certain property of the judgment-debtor's family being liable to attachment and sale in execution of a decree against the judgment-debtor was *res judicata* in regard also to the attachment of the other property of that same family in execution of that same decree. So also in *Sher Singh v. Daya Ram*,¹⁴ in which an application for execution though barred by Sec. 573 of the Civil Procedure Code had been proceeded with, the High Court held that the principle of their Lordships' decision prohibited the court "from going behind a formal application admitted by a court executing a decree in which a notice had been issued to the judgment-debtor and proceedings from time to time have been taken thereunder in execution of that decree." Similarly in *Kishan Sahai v. Aladad Khan*,¹⁵ a decision against a person who had been impleaded in the appeal, and therefore remained a party to the suit on remand, was held binding on him in execution-proceedings, even though he had not made his defence properly. The Panjab Chief Court also in *Fakir Baksh v. Mayadhari*¹⁶ held that an order releasing certain property from attachment in execution of a decree, on the ground of its not having been liable to such attachment, would bar a fresh attachment of the same property in execution of the same decree.

¹³ I. L. R. XV Mad. 402.
¹⁴ I. L. R. XIII All. 584.

¹⁵ I. L. R. XIV All. 64.
¹⁶ 1896 P. R. No. 4.

The decision of their Lordships of the Privy Council in *Delhi and London Bank v. Orchard*¹⁷ is really not against that view, as it was simply to the effect that an order sending an application for execution of a decree to the record-room on the ground of non-receipt of the Commissioner's sanction, which was required under a local law, was not an adjudication within the rule of *res judicata* or within Sec. 2 of Act VIII of 1859. And this was the view taken of their Lordships' decision by the Bombay High Court in *Manjunath v. Venkatesh Govind*,¹⁸ in which Melvill, J., in delivering the judgment of the Court said, that "the order was not in the nature of an adjudication at all, and that the description of it in the head-note to the Report in the Indian Appeals, and still more the description in the head-note to the Calcutta Report is incorrect, and gives an erroneous idea of the meaning of the Judicial Committee's observation. The Deputy Commissioner did not in fact, decide that the application was time-barred, nor did he decide anything. . . . We do not think that the question, whether a decision that an application is time-barred is *res-judicata*, is in any way concluded by the observation of the Privy Council in the *Delhi and London Bank v. Orchard*." To some extent, the Calcutta High Court also held the same in *Hurrosoondary v. Jugobundhoo*;¹⁹ in which case White, J., in delivering the judgment of the Court, after referring to their Lordships' decision said: "The precise ground upon which their Lordships' decision proceeded is not stated. Possibly, it may have been that the refusal of the application was not to be considered as an adjudication on the point. But whatever their reasons may be, the case is a clear authority, that the application which the appellants made (for recovering property of which possession had been transferred under a decree since reversed) on the 23rd May 1879 is not barred by the refusal" of their previous applications, which refusal was not based on the merits of the order. This decision, however, is not an authority for the general proposition that the law of *res-judicata* does not apply to proceedings in execution of decree; because the learned Judge distinguished a previous case on appeal from Appellate order No. 169 of 1878, in which he and Mitter, J., had held 'that a question decided in the course of prior execution proceedings was deemed *res-judicata*, and could not be raised again in subsequent proceedings.' But that was a very different

¹⁷ L. R. IV I. A. 127.¹⁸ I. L. R. VI Bom. 54.

I. L. R. VI Cal. 203.

case from the present. There the question was as to the construction of a decree ; it was raised by the judgment-debtor a second time after it had on a previous application for execution been decided in favor of the judgment-creditor, and after the judgment-debtor had preferred an appeal against the decision, but had not thought fit to prosecute it." Nor is the decision in *Sheik Budan v. Ramchandra*²⁰ against that proposition as it turned on the point decided not having been controverted in the former proceedings. West, J., thus said in that case that, "after execution had been had against the mortgaged property, the judgment-debtor was called on to show cause why, though more than one year had elapsed since the last preceding step in execution, the execution should not be further proceeded with. The application had, in fact, been made for execution against the person of the judgment-debtor, but the notice gave him no intimation of this. He had no reason to suppose that the application went beyond the terms of the decree. He did not appear, and, in his absence, an order was made for execution against his person, but it was not executed, because the judgment-creditor failed to pay the requisite fee. Such an order, *primâ facie* only of an executive character, could not possibly have the effect of *res-judicata*, unless the judgment-debtor being called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, had then either failed in his contention to the contrary, or, at any rate, allowed the judgment to go by default. The order made by the Subordinate Judge was *res-judicata* as to the legal possibility of further execution in terms of the decree, but not as to the special construction which the judgment-creditor sought to impose on it."

297. The same principle is applicable to proceedings in appeal. Thus, Mr. Herman observes, "If a suit is remanded on appeal for a fresh decision, an appeal from the fresh decision brings up for decision nothing but the proceedings subsequent to the reversal. None of the questions decided on the first appeal can be re-heard or re-examined upon the second appeal."²¹ If an Appellate Court has ever so erroneously decided that it has jurisdiction of a cause, the parties to the cause are bound as *res-judicata* by the decision as to the jurisdic-

An order passed on appeal is binding on the parties in all the subsequent stages of the suit.

tion ;²² and thus even when the court decides on merits only, because the Appellate Court in so deciding must have held that it had jurisdiction not only of the cause, but also of the parties.²³ Mr. Hawes, in his Work on Jurisdiction says : “ After appeal whatever was before the Appellate Court and disposed of is finally settled, the inferior court is bound by the decree as the law of the case, and must carry it into execution according to its mandate. . . . On a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate.”²⁴ It has often been held by the American Courts that the law as decided upon any appeal must be applied in all the subsequent steps of the suit.²⁵

The Indian Courts have also taken the same view. Thus in *Ram Lal v. Chhab Nath*,²⁶ Sir John Edge and Brodhurst, JJ., held that a finding on an appeal by a defendant as to the plaintiff's title would be *res-judicata* in the disposal of an appeal from the decision by the plaintiff which came to be heard later. Their Lordships of the Privy Council also, speaking of the effect of a prior order of remand passed *ex-parte* by them, said in *Juggodumba Dossee v. Tarakant*²⁷ that “ it must stand as if all the arguments which the respondents, if present, could have raised upon the case, had been addressed to them.”

²² Herm. Comm. 119.

²³ *Renick v. Ludington*, 20 W. Va. 511.

²⁴ Haw. Jur. 35.

²⁵ *Chouteau v. Gibson*, 76 Mo. 38.

Lucas v. San Francisco, 28 Cal. 501.

Sturgis v. Rogers, 26 Ind. 1.

²⁶ I. L. R. XII All. 578.

²⁷ VI C. L. R. 127.

ADDENDA AND CORRIGENDA.

Page 2, line 39, *after maxims read*—dictated by wisdom and sanctified by age,

Page 3, line 3, *after law."* *read*—

It was pointed out in *Gray v. Pingry*, ^{5a} that much more injustice might be done in reviving forgotten issues than in limiting the right to prosecute.

^{5a} 44 Am. Dec. 345.

Page 3, footnote 10, *before Sm.* *read* 2

Page 6, line 25, *after country.* *add*—

Regulation III. of 1793, Sec. 16, provided, that the Zillah and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall appear to have been heard and determined by any former Judge or any Superintendent of a Court having competent jurisdiction. The omission from this section of the qualification as to the former determination having been between the same parties led to some confusion, but ordinarily the rule was acted upon as subject to that qualification on the analogy of, and in accordance with, the practice of the English Courts. The omission was formally supplied in the Civil Procedure of 1859, in which it was enacted by Sec. 2 in a more complete and formal manner.

Page 7, footnote 20, *for* 425. *read* 125.

Page 12, line 39, at the end of the note, *add*—

In *Bell v. Merrifield*, ^{44a} in the New York Supreme Court, Peckham, J., said: "One of the tests sometimes mentioned which will determine the question whether two causes of action are identical is to see if the same evidence will sustain both; though the form of the actions may be different, the causes may be the same, and they generally are the same, where the same evidence equally supports either."^{44b} In *Gayer v. Parker*, ^{44c} the dismissal of a suit for certain materials brought on a contract which was not proved was held by the Supreme Court of Nebraska not to bar a suit for the value of those materials on the ground of their misappropriation by the defendant; Maxwell, J., observing that "the test as to whether the former judgment is a bar generally is, whether or not the same evidence will sustain both the present and the former action."^{44d} The same has been held by the Supreme Court of West Virginia in *Gallaher v. City of Moundsville*.^{44e}

^{44a} 4 Am. St. Rep. 436.

^{44b} *Stowell v. Chamberlain*, 60 N. Y. 272.

^{44c} 8 Am. St. Rep. 227.

^{44d} *Cannon v. Brame*, 45 Ala. 262.

Percy v. Loebe, 36 Conn. 102.

^{44e} 26 Am. St. Rep. 942.

Page 24, line 10, *omit superior figure* 73

Page 24, *omit footnote* 73

Page 28, line 18, *after property."* *add*—

The question has been set at rest by Act VI of 1892 which provides that applications for the execution of decrees are proceedings in suits, and that Sec. 647 of the Civil Procedure Code does not apply to them.

Page 33, line 6, *after former suit.* *read*—That was long the recognized law of England. $\frac{1}{2}$

$\frac{1}{2}$ *Delta, The*, 1 P. D. 402.

Houston v. Sligo, 29 Ch. D. 454.

Page 34, line 9, *after higher nature."* *add*—

Similarly Mr. Wells says: "It is the first judgment rendered which controls, whether the action in which it is reached be instituted before the other or not."^{5a} This was quoted with approval in *Memphis v. Grayson*, ^{5b} by McClellan, J., who referred to several other cases ^{5c} also in support of it. The Pennsylvania Supreme Court in *Duffy v. Little* ^{5d} distinguishing between the principles underlying the rules of *lis pendens* and *res judicata* says: "Although the priority of an action may be a very great reason why a subsequent one for the same cause shall not abate it, and why the first when pleaded properly should abate the second, as the plaintiff ought not to be permitted to vex and harass the defendant, against his will, with two actions for the same cause, yet it is obvious that it is not the priority in the commencement of the one action that renders the judgment obtained therein a bar to the plaintiff's obtaining a second judgment in the other, but because the first judgment, when given, whether it be in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff in lieu thereof, one of a higher order."

^{5a} Wells Res. Jud. 247.

^{5b} 16 Am. St. Rep. 74.

^{5c} *Child v. Powder Works*, 45 N.H. 547.

McGilvray v. Avery, 30 Vt. 538.

Wood v. Gamble, 59 Am. Dec. 135.

Rogers v. Odell, 39 N.H. 452.

Stout v. Lye, 103 U.S. 70.

Lowe v. Mussey, 41 Vt. 392.

Peak v. Ligon, 10 Verg. 468.

^{5d} *Watts*, 130.

Page 34, footnote 7, *omit*—*Memphis v. Grayson*, 16 Am. St. Rep. 69.

Page 34, footnote 8, *for hathappan read*—Chathappan.

Page 61, line 11, *before it read*—and

Page 61, line 12, at the end of para, *as*

Sir Richard Garth in delivering his leading judgment in the case said : " Both the learned Judges of the Division Bench appear to have considered, that the issue thus raised was immaterial for the purposes of that suit, because whichever way it was decided, the plaintiff would have been entitled to the rent which they claimed. But I confess I am unable to adopt that view. It seems to me that it was a very material question in that case, and certainly it was one to which the parties themselves attached great importance, whether the rent which the then defendant admitted to be due was payable in respect of the larger or the smaller area.....The issue was in fact the only question in the cause, and I cannot doubt that if the defendant had so pleased, they might have made the decision upon that issue the subject of appeal. But they did not choose to take that course. They accepted the adverse judgment of the Court without appealing from it; and now the question arises in the present case, whether that judgment is not conclusive? I am of opinion that it is."

Page 63, line 15, *after its disposal.* " *add*—

This test of the directness of an issue is recognized in the United States also. Thus in *Towns v. Nims*,³ an action was brought for breach of a contract for labour for one year at a fixed price, on the ground that the defendant discontinued labour after one month. In a previous suit by the defendant for a month's pay, the entire contract for the year was set up in defence. The jury found for the former plaintiff, the defendant in second suit; but the decision was held not to be *res judicata* in the subsequent suit. Richardson, J., in delivering the judgment of the New Hampshire Supreme Court said: " The question in the action which Nims (the labourer) brought against Towns (the employer) was, whether there was an implied contract to pay for a month's labor. Towns attempted to prove that the month's labor had been done under a subsisting contract to labor for a year, which contract had never been performed by Nims. This, if proved, was a decisive answer to the action, because if the labor had been done under a subsisting special contract to labor for a year, there could be no implied contract. Yet, still the question in issue was, whether there was an implied contract, and although it must now be concluded that the jury found that there was no special contract, this conclusion is a mere inference from what they did find. They found there was an implied contract, and we infer from this finding that they could not have been satisfied of the existence of a special contract. It is therefore clear that the existence of the special contract was not directly tried in the first suit, and whatever may have been the finding of the jury in that case in relation to the special contract, it can conclude nothing in this case."

³ 20 Am. Dec. 578.

Page 63, line 27, *after res judicata.* " *add*—

Mr. Flint in his article on *Res Judicata*^{1a} broadly says: " Issues to be affected by the doctrine of *res judicata* must be of material importance; if they are frivolous in their nature, or if irrelevant to the case, they are in effect immaterial. A judgment is conclusive only upon matters directly in dispute and actually decided, and in order to prove these matters material it must appear from the judgment that they were directly adjudicated or that the judgment as given could not have been thus rendered unless some preliminary and perhaps minor matters had been adjudicated, or at least assumed to be settled in a certain way."

^{1a} xxi Encyc. Law. 203.

Page 64, line 16, *after present it.* *add*—

In *Lorillard v. Clyde*,^{15a} Vann, J., in delivering the judgment of the New York Supreme Court, said:—" A judgment rendered on the merits is co-extensive with the issues upon which it is founded, and is conclusive between the parties thereto, not only as to the matters actually proved, argued, and submitted for decision, but also as to every other matter directly at issue by the pleadings which the defeated party might have litigated"¹⁶

^{45a} 19 Am. St. Rep. 473.

^{45b} *Jordan v. Van Epps*, 85 N. Y. 427.

Smith v. Smith, 79 N. Y. 634.

Tuska v. O'Brien, 68 N. Y. 446.

Bloomer v. Sturges, 58 N. Y. 168.

¹⁵ *v. Clemens*, 37 N. Y. 59.

Doty v. Brown, 53 Am. Dec. 350.

Burt v. Sternburgh, 15 Am. Dec. 402.

Aurora City v. West, 7 Wall. 82.

Page 64, line 32, to the quotation ending with the word *before.* *add as a note*—

This was a case from Scotland, where as a general rule *res judicata* is held to be a bar only when there is no *res noviter veniens in notitiam*, and no fresh *medium concludendi*, and as Lord Blackburn observed in his judgment: " The plaintiff in the action is not obliged to join all his *media concludendi* in one suit; if he has one *medium concludendi*, and fails in proving that, he may start another, and that whether or not he knew of it at the former time, provided it be a separate *medium concludendi*. The new *medium* alleged in this case was that ' amongst other means of carrying out the fraud, the Lawsons had been parties to giving a bribe of £ 15,000 to Engelbach and Keir who were parties to the fraud,' their Lordships held, however, that that was " only a fresh discovery of evidence, a fresh ingredient tending to prove the fraud upon which they relied."

Page 68, line 39, *after* plead.

The same rule has been held to apply in partition

65a Bob v. Graham, 39 Mo. 300.
Davis v. Durgin, 64 N. H. 51.

| Scuddy v. Shaffer, 14 La. Ann. 576.
| Christy v. Springval. W. W., 84 Cal. 541.

Page 69, line 26, *after* imperative. *add*—

If a set-off is pleaded, however, a finding on it will bar a subsequent suit for it ; and even if it is not allowed by inadvertence, the omission will be as effective as a direct decision against it.^{65a} Mr. Flint says ^{65b} :—“ A set-off cannot be split up so as to have a portion adjudicated in the first suit, and a subsequent acti on brought for the remainder.^{65c} If set-offs which should have been ruled as irrelevant to the first suit are in reality passed upon, they are as completely barred as if there had been no question as to the propriety of considering them.^{65d} If a set-off as claimed has not yet matured and is not allowed because of that effect, it is no bar to another action after it has fully matured.^{65e} If an account or claim is unintentionally included in a suit or set-off, and is really adjudicated, the finding is just as conclusive as in any other case. In short, it may be said, that if these defences are submitted they become subject to the general rule as to *res judicata* ; if not presented, they may, in general, become the subject of a subsequent action.”

65a Green v. Sanborn, 150 Mass. 454.
Howe v. Lewis, 121 Ind. 110.
Stevens v. Miller, 13 Gray, 283.
65b XXI, Encyc. Law, 224
65c Herring v. Adams, 5 W. & S. 459.
Rice v. Whitney, 12 Ohio, 358.

65d Thompson v. Wineland, 11. Mo. 245.
Ehle v. Bingham, 7 Barb. 449.
65e Crabtree v. Welles, 19 Ill. 55.
Carter v. Hannu, 2 Ind. 45.
Patrick v. Shaffer, 94 N. Y. 423.

Page 69, footnote 70, *for* 858. *read* 872.

Page 72, line 21, *after* goods.⁷⁵ *add*—

The weight of authority, however, is against that view. Thus Mr. Wells says: “A suit on a contract, in which a promise is alleged and a breach of the promise, is held not to debar a subsequent action in tort based on fraudulent representations in making the contract,—these issues being essentially different.^{75a} That was held directly in *Norton v. Husley*^{75b} by the Massachusetts Supreme Court, who said : “ That was an action of contract in which a promise and a breach of the promise were averred. This is an action of tort in which the plaintiff alleges that he sustained damage by the wilfully fraudulent representations of the defendant. Proof which would fully support the one would have no tendency to maintain the other, for the reason that the questions involved in the respective issues were essentially unlike. It follows, as a necessary consequence, that the judgment in one of them is not competent evidence upon the trial of the other, and cannot have the effect of precluding the plaintiff from maintaining it.”

, Ind. 24

75b

Page 72, line 34, *after* amount.⁷⁸ *add*—

In *Hobby v. Bunch*,^{78a} Bleckley, C.J., in delivering the judgment of the Georgia Supreme Court, said :—“ Although the maker of a note given for the purchase-money of fertilizers cannot waive the right to set up, as a defence to an action upon the note, the illegality of the contract for lack of inspection of the fertilizers, or for lack of any other requisite to render the sale and purchase compatible with the law of the land, yet by failure to repudiate the waiver and set up and establish the illegality as a defence to that action, the right to raise the question is forever gone when final judgment has been rendered.”

78a 20 Am. St. Rep. 306.

Page 72, footnote 75, *for* 93. *read* 393.

Page 72, footnote 76, *add*—*Rowe v. Smith*, 16 Mass. 307 ; *State v. McBride*, 76 Ala. 51.

Bird v. Smith, 56 Am. Dec 635.

Page 72, footnote 77, *omit*—*Cadaval v. Collins*, 4 Ad. and El. 858.

For Elliott, 40 Am. Dec. 635. *read*—*Elliot*, 60 Mo. 25.

Page 73, footnote 83, for Glison read Gibson

Page 75, footnote 90, for M. 8 & W. 818. read—8 M. & W. 858.

Page 76, line 27, for a which, read—in which.

Page 76, line 37, after had done.⁹⁴ read—

Mr. Wells says ^{94d} broadly that a judgment covered against the purchaser for the balance of the contract price will debar him from suing the manufacturer for a breach of the contract.

^{94d} Wells Res. Jud. 282.

Gibson v. Bingham, 5 Am. Rep. 289.

Kelloy v. Denalow, 14 Conn. 420.

Page 77, line 22, omit the.

Footnote 97, For Mayor, read—New York. For Brooklyn read—Brooklyn,

For Ackey v. Westernett, read—Ackley v. Westervelt.

Page 77, footnote 100, for Cin. read—1 Cin.

Page 81, footnote 16, omit—*De Medina v. Grove*, L. R. 10 Q. B. 172.

Page 84, line 11, after bar it. read—bar it.⁹⁷

Page 84, line 19, after consideration. read—

It has been repeatedly laid down by the American Courts that the general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint.^{97a}

^{97a} Barton v. Anderson, 104 Ind. 578.

Jarvis v. Driggs, 69 N. Y. 143.

Argall v. Pitts, 78 N. Y. 239.

McCardy v. Banghman, 43 Ohio, 78.

McCalley v. Wilburn, 77 Ala. 549.

Hanham v. Sherman, 114 Mass. 19.

Goble v. Dillon, 44 Am. Rep. 308.

Page 84, footnote 31, for Rep. read Rev.

Page 88, line 10, after fail.⁴⁶ add—

In *Commissioners of Marion Co. v. Welch* ^{46a}, the Kansas Supreme Court said :—"That a general finding of title in the plaintiff—consequently of no title in the defendant—is a conclusive and binding decision against the defendant on the question of title, from whatever source it may be derivated, and forever estops him from asserting a claim of title which existed at the time of the decree." This was cited with approval by the Court in *Hentig v. Redden*, ^{46b} in which Horton, C. J., in delivering the judgment of the Court said : "Under the provisions of the Civil Code, an action in the nature of ejectment, settles the title between the parties in favour of the one recovering the judgment ^{46c}. If H. had in her possession the deed from P. for the lots during the pendency of the former action of R. against herself, she could have offered that deed in evidence for what it was worth, to sustain her title and her right of possession. If necessary, she could have filed a supplemental answer . . . where all matters in controversy between parties as to the title or possession of real estate might be finally ended in one action, the law requires that this should be done. Parties cannot try title to real estate by piecemeal, in separate and independent actions upon separate deeds or chains of title, when they have in their possession during the trial separate and different deeds."

^{46a} 40 Kan. 770.

^{46b} 26 Am. St. Rep. 91.

^{46c} Barrows v. Kindred, 4 Wall. 403.

Mahoney v. Middleton, 41 Cal. 41.

Edwards v. Roys, 18 Vt. 473.

v. Douglas, 7 Am. St. Rep. 476.

Page 89, footnote 49, for H. Bl. read 2 W. Bl.

Page 90, footnote 53, for 3 Bing. N. C. 456. read—5 Bing. N. C. 444.

Page 105, line 31, for time. read—time." So also Bramwell, B., said.

Page 106, line 14, for suit. read—suit.^{98a}

^{98a} Ramachandra v. Durvada, III M.H.C.B., 207.

Page 106, line 14, after thus add—

Lord Justice Turner in delivering the judgment of their Lordships of the Privy Council in *Shama Purshad Roy v. Hurro Purshad Roy*, ^{98b} speaking of the rule of *res judicata* as first enacted in India, expressed it as their opinion that it "applies only to cases in which the question to be determined in the cause is the same question as has been already heard and determined, and not to cases like the present in which new circumstances have intervened, and altered the nature and character of the question to be determined. . . . It is obvious that there is an essential difference between the question whether T was entitled to recover against D., before the order of Her Majesty in Council was pronounced, and the question whether, after that order was pronounced, he was entitled to hold the money which he had previously recovered." Similarly.

^{98b} X M. L. A. 211.

Page 107. line 5, *for* debt, *read*—defendant.

Page 107. line 9, *for* upon *read*—on

Page 107, line 12, *after* default." *add*—

The same view is taken in the United States. Thus in *Thrift v. Delaney*,^{97a} the Supreme Court of California said that the bar of the judgment was in such cases "limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition which give the defeated party a title or right of possession." The same Court has held in other cases also that if any new rights are acquired, a new action will be open, for the issues having been changed in consequence, the action is different in its scope, and the second action is one which there would not have been ground for at the time of the previous suit.^{97b}

^{97a} 69 Cal. 188.

^{97b} *Mahoney v. Van Winkle*, 33 Cal. 458.

Jackson v. Lodge, 36 Cal. 31.

Page 108. line 8, *after* that suit.¹ *add*—

In *Dewey v. St. Albans*,^{1a} Rowell, J., in delivering the judgment of the Supreme Court of Vermont, said: "The doctrine of estoppel by judgment has no application to a case that is ambulatory in its nature, and has ceased to be the same by progression."^{1b} Thus, a judgment for the defendant in an action of trespass *quare clausum* is not conclusive upon the right of possession at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or the right that the defendant had at the former trial.^{1c} And intervening events affecting the issue may be shown to prevent a former judgment from being conclusive even when the title has been tried in a writ of entry."^{1d}

^{1a} 6 Am. St. Rep. 90.

^{1b} *People v. Mercier*, 38 Am. Dec. 644.

^{1c} *Thayer v. Carew*, 13 Allen, 82.

^{1d} *Perkins v. Parker*, 19 Allen, 22.

Page 111. last footnote. *For* 13 *read* 12

Page 113. line 17, *after* res judicata.² *add*—

It has been laid down in several cases that if the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will be no bar to another suit.^{24a} In *Carmony v. Hooper*,^{24b} Bell, J., in delivering the judgment of the Pennsylvania Court said: "It has been held an acknowledged principle that when it can be gathered from the record that the merits of the controversy were not passed upon in the first action, but the determination proceeded upon some technical objection not affecting the plaintiff's ultimate right to sue, the first judgment will constitute no bar to the second suit."

^{24a} *Jordan v. Siefert*, 126 Mass. 25.

Gould v. Evansville R. Co., 91 U. S. 523.

Verhein v. Stickheim, 57 Mo. 326.

Pepper v. Donnelly, 87 Ky. 259.

v. Huggins, 57 Ill. 241.

5 Pa. St. 395.

Page 114. line 21, *after* accruing due.³³ *add*—

Mr. Flint in his article on *Res Judicata* says:^{33a} "An action brought before there is any claim, or anything due, or before anything can be done in the way of remedy, has no effect on a subsequent action brought when the cause of action has actually matured. If a required demand has not been made, or if the plaintiff is suffering from some temporary disability, or if, through some statutory provision, an action will not yet lie, an attempt to recover will be unprejudicial when these circumstances are changed."^{33b}

^{33a} XXI Encyc. Law, 272.

^{33b} *Tracy v. Merrill*, 103 Mass. 280.

Conn. v. Bernheimer, 67 Miss. 498.

Dillinger v. Kelly, 84 Mo. 561.

Pepper v. Donnelly, 87 Ky. 259.

Krapp v. Eldridge, 33 Kan. 106.

Page 114, footnote 27, *for* 41 *read*—4

footnote 30, *at the beginning*, *add*—*Kali Krishna Tagore v. Secretary of State for India*, L. R. XV I. A. 186.

Page 116. line 7, *after* the plaintiffs." *add*—

The decisions in *Raghonath v. Juggout Bundhoo*,^{40a} and in *Nil Madhub v. Brajo Nath*^{40b} are not against this. The former turned on the ground that the question of the extent of the land for which the defendant had been paying the rent claimed, even if relevant in the earlier suit, had not been heard or determined in it. In the latter case, the claim in the earlier suit was for arrears of rent for certain years on account of a certain quantity of land, and the defendant denied his liability for the entire amount on the ground that a portion of the land comprised in the tenure was in the possession of the plaintiff himself. The Court without framing any issues and without having any measurement of the land, but after considering the evidence which the defendant adduced, rejected his contention on the ground that he had failed to prove

it; and the decision was held not to be *res judicata* in regard to the same contention by the defendant in a subsequent suit by the plaintiff for rent for the same land for some subsequent years. Macpherson and Banerjee, J. J., said: "The decision in the suit of 1888 went no farther than this, that the defendant, upon whom the burden of proof lay, had failed to make good the plea he advanced, and the necessary consequence was that he failed to get the relief asked for, that is to say, a reduction of the rent for the years for which the rent was then claimed. But the cause of action is in this case different, each year's rent being in itself a separate and entire cause of action, and the mere failure of the defendant to prove what he tried to prove in the previous suit would not, we think, prevent him from proving it in this. The case might have been different if the Court had in the previous suit definitely determined the area of the land in the defendant's possession and the annual rent payable for the same. It might then be said that the determination was general, and not limited to the particular years for which rent was claimed, and that the defendant could only succeed in the present suit by proving that the area and rent had since altered. The determination was not, however, of that character, and there is nothing in the judgment to indicate that the Court intended to decide anything more than it was strictly necessary to decide for the purpose of the suit, *viz.*, the amount of money which the plaintiff was to recover for the years then in question.....We cannot say that the questions which the defendant raises in this suit were heard and finally determined in the suit of 1888."

40a 1. L. R., VII Cal., 214.

40b 1. L. R., XXI Cal., 296.

Page 119, footnote 55, *for* 1 All. *read* 11 All.

Page 121, line 15, *after* concluded, *add*—

In *Earl v. Bull*,^{61a} a breach of warranty had been pleaded in a former suit for the price of goods, and evidence was taken as to it, and the trial Court instructed the jury that "if the plaintiff, on the day the contract matured, presented their account and offered to deliver the goods, they fulfilled the contract on their part, and if the defendants did not, within a reasonable time, and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover." The claim was decreed without any express verdict to the plea, and that the decree would not bar a suit on the breach of warranty for the difference in value between the goods delivered and those contracted for.

61a 15 Cal. 421.

Page 124, line 21, *omit* Superior figure 72. *Omit* footnote 72.

Page 126, lines 21 and 22, *omit* in *Kronprinz v. Kronprinz*, and footnote 88. *For* 11 Jur. N. S. 107, *read*—34 L. J. Ch. 239.

Omit footnote 89.

Page 127, line 4, *for* Verdict *read*—Verdict."

Page 127, line 7, at end of line, *add*—

"It has been held in several other cases also that a *bono fide* judgment would be binding, even if based on an agreed statement of facts in which there was an error sufficient to change the result."^{62a}

62a Wohlford v. Compton, 79 Va. 233.
Ohamberlain v. Preble, 11 Allen. 370.

Dean v. Thatcher, 32 N. J. L. 472.
Kirby v. Fitzgerald, 31 N. Y. 424.

Page 127, line 20, *after* *res judicata*. *add*—

Mr. Flint in his article on *Res Judicata* says: "Judgments by confession or consent, if given intelligently and voluntarily without collusion or fraud, are conclusive. They may be more carefully examined than judgments resulting from a trial, as the latter are decisions on the merits, while the former are given only as the parties can manage without contest. It is not material whether this judgment is had in the first instance, or only after litigation which is not finally terminated; and after judgment, by agreement, it can be re-opened and reversed, and still have the same binding force. If a case is dismissed by agreement, it is apparent that a mutual understanding has been reached and that the entry made is simply to prevent any other suit upon the same matter. A confession of judgment in ejectment is just as effective as it is in any other class of cases; it concludes the issues and waives all rights and defences."^{63a}

63a XXI Encyc. Law, 227.

Page 129, line 1, *for* has expressly held that, *read*—held the same in *Burlen v. Shannon*,¹⁸ in which Foster, J., in delivering the judgment of the Supreme Court said: "A judgment and verdict are conclusive only as to those facts which were necessarily involved in them, without the existence and proof or admission of which such a verdict and judgment could not have been rendered."

1293 Am. Dec. 783.

Page 129, line 11, at the end of the para, *add*.—

Mr. Flint in his article on *Res Judicata* says: "There are many points which are elementary and present as the foundation upon which to

base an action, which, though not passed upon directly, yet are impliedly and as a matter of course disposed of in a way to make it possible to consider the main question. Any conclusions which a Court or Jury must evidently have arrived at in order to have reached the judgment or verdict rendered will be fully concluded. If a decision could not have been reached without passing upon certain minor matters, and yet the decision is reached, it is a fair and inevitable conclusion that those matters have been considered and passed upon, and that the conclusion as to them was such as it must be to harmonize with the subsequent judgment depending so largely upon them. The rule is that whatever is directly adjudged and also whatever must be established in fact, and in any way made the subject of proof conclusive before any such judgment could have been rendered, is binding upon parties, privies or others not strangers, so long as the judgment stands, and all these matters involved are then subject to the doctrine of *res judicata*. All matters included in a judgment, which have not really and legally been passed upon, inasmuch as they are outside of, beyond and foreign to the issue, are surplusage and have no effect." 13a

13a XXI Encyc. Law, 193.

Page 129, line 36, *after* states also, *add*—

Thus in *Hooker v. Hubbard*, 17a it was held by the Massachusetts Supreme Court that a defendant, who in an action against him on a promissory note had succeeded on a plea and proof of a subsequent note for the same amount as given in renewal thereof, would be estopped from pleading in defence in a suit on the second note, that he had given it on a condition which was never fulfilled. The court said: "Where a conclusion is indisputable, and could only have been drawn from certain premises, the premises are equally indisputable with the conclusion. The judgment already rendered between these parties established that the former note was paid by this one. To be valid as a payment it must necessarily have been valid as a note. That it was so, had therefore been judicially determined, and could not be controverted again."

17a 102 Mass. 239.

Page 130, *after* line 5, *add*—

In *Young v. Brehe* 20a, the plaintiff had sued on two promissory notes, and the defendant pleaded that he had conveyed certain property of his to the plaintiff in full payment of those as well as the other notes held by plaintiff, and a verdict for the amount claimed was held to bar the raising of the same plea in a suit on the other notes; and Leonard, J., in delivering the judgment of the Court, said: "The verdict and judgment in the former case established the fact conclusively that the deed referred to was not delivered or accepted in payment or satisfaction of plaintiff's demands, and consequently that the notes and claims in question in that action had not been paid thereby. If there was not such delivery or acceptance of the deed as to constitute payment of the demands in question in that action, the same was true of the notes involved in this, because the transaction was entire, and the conveyance covered and satisfied the whole indebtedness, if any part of it. Upon these facts, the judgment in the former case, as evidence, was conclusive against defendant upon the only material issues raised in this case." 20b

20a 3 Am. St. Rep. 892.

20b *Burt v. Sternburgh*, 15 Am. Dec. 402.

Burke v. Miller, 4 Gray, 115.

White v. Coatsworth, 6 N. Y. 139.

McLeod v. Lee, 17 Nev. 103.

Carpenter v. Schmidt, 85 Am. Dec. 187.

Gierlner v. Buckbee, 15 Am. Dec. 256.

Page 130, line 6, *for* Burhams *read* Burhans

Page 130, line 20, *add as note to state*—

Thus in *Hynes v. Astey*, 23a Bradley, J., said: "A judgment is *res adjudicata* as to those matters only which are within the subject-matter of the litigation, and those which, as incidental to, or essentially connected with it, might legitimately have been litigated in the action. The question, and the only issue necessarily involved in the former action was, whether there was in the public the right to the strip of land as and for a street, and when the existence of such easement was determined, the purpose of the action was accomplished. To that extent the adjudication is conclusive upon the plaintiff. But whether the place was used as a street, or open or visible as such, at the time of the sale by Estey to Todd, was not, so far as appears, legitimately within the purview of that action, or essentially for any purpose involved in its determination. That fact, therefore, was not material to that controversy, and for that reason the plaintiff in this action for breach of covenant is not concluded by any expressions in that respect in the findings of the court in the former action."

23a 15 Am. St. Rep. 425.

Page 133, line 5, *after* looked *read*,—And held that he could look—

line 7, *after* him, *add*—

In *Peruvian Guano Co. v. Dreyfus Brothers Co.*, 25a Lord Watson said: "I hold it to be not only competent but necessary to refer to the pleadings of the parties and to the other orders of Court for the purpose of ascertaining the precise issues raised in the action with respect to detention, and the extent to which these were dealt with by the Court either affirmatively or negatively."

25a A.C. 184.

Page 133, footnote 38, *for 88, read 38*

Page 134, line 11, *for decided, read decided."*

Page 135, line 36, As a note to estoppel. *add—*

Speaking of the identity of the issues in the two suits, Mr. Wells says ^{48a} : "The rule deducible from the authorities is that this may be proved by such parol evidence as does not contradict the record, but in all cases the record, so far as it presents the matter at all, must control as to what was the issue in the first case. . . . It is competent for a party to prove by parol what questions were really considered and determined in the prior action, ^{48b} whenever the form of the issue in the trial relied on is so vague that this cannot be ascertained by inspection of the record ^{48c}. But when the record does show either that an issue was or was not tried, parol evidence on that matter is not allowed to contradict it; but what needs not to appear, or what in fact does not appear, may be proved by parol, in order to establish the identity of the subject-matter, or of the grounds on which the former judgment was rendered."

^{48a} Wells Res, Jud. 252.

^{48b} Battorff v. Wise, 53 Ind. 35.

^{48c} Miles v. Caldwell, 2 Wall. 43.

Page 136, line 3, *after but read—it is.*

line 5, *for to show read—that it may be shown.*

line 10, *for suit, read suit.*^{50a}

footnotes, *add—*

Dutton v. Woodman, 57 Am. Dec. 46.

footnote 51, *for 388 read 358*

Page 137, line 1, *after party. add—*

Mr. Flint says: ^{52a} "If a case includes a variety of issues which are submitted to the jury at the trial, with sufficient evidence to establish them, it will be *prima facie* proof that all these issues have been determined, and included in, and concluded by the verdict, if such verdict is a general one which presumably covers every point involved in the case."

XXI Encyc. Law.

Page 137, at the end *add—*

In *Russell v. Place*, ^{53a} Field, J., in delivering the judgment of the Court said:—"If it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

^{53a} 94 U. S. 606.

Page 138, line 34, *after the same,*

his article on

^{61a}

"A final judgment is one which determines the rights of the parties in the suit or a distinct and definite branch of it, and reserves no further question or direction for future determination, ^{61b} except such as may be necessary to carry into effect, ^{61c} but a judgment may be final though it does not determine the rights of the parties, if it ends the particular suit. . . . As a general rule, a judgment is not considered final which settles part only of several issues of law or fact." ^{61d}

^{61a} XII Encyc. Law, 63.

^{61b} Leese v. Sherwood, 21 Cal. 151.

Chicago L. Ins. Co. v. Auditor, 100 Ill. 478.

Morris v. Morange, 38 N. Y. 172.

Linn v. Arambould, 55 Tex. 611.

Ware v. Richardson, 56 Am. Dec. 762.

Feaff v. Hewitt, 59 Am. Dec. 634.

^{61c} Klink v. Str. Cusseta, 30 Ga. 504.

Ludlow v. Kidd, 8 Ohio, 541.

^{61d} Hicks v. Gooch, 93 N. Car. 112.

Welch v. Kinsland, 93 N. Car. 281.

Bond v. Marx, 53 Ala. 177.

Shirey v. Musgrave, 29 W. Va. 276.

Page 140, line 36, at the end of the para, *add—*

In *Ramasami v. Sami*, ^{73a} a decree of redemption under Sec. 92 of the Transfer of Property Act, 1882, conditional on payment of the mortgage amount within three months, and directing that the plaintiff mortgage will be barred from redeeming after that was held to be *res judicata* in a suit for redemption after the expiry of three months without payment. It was that the decree was not final as it had not been followed with an order under of the Act, but Sir Arthur Collins, C. J., and Davies, J., said:—"Orders passed 93 are, in our opinion, merely supplementary to the decree under section 92. the terms of the decree have or have not been fulfilled. It is clear"

in this case when the three months' time allowed in the decree had elapsed without payment being made, no extension of time for payment having been granted, the decree became a final decree without any further orders being required. That decree then being a final one after confirmation in appeal, the present suit being based on precisely the same cause of action as that suit is, of course, barred as *res judicata*."

^{73c} I. L. R., XVII Mad., 96.

Page 144, footnote 80 *for 89 read 80*

Page 144, footnote 83, *for Compant read Compar*

add at the end—Rogers v. Hatch, 8 Nev. 39; *Cain v.*
16 Nev., 430; *Young v. Brehe*, 3 Am. St. Rep. 892.

Page 147, line 34, *at end of para add—*If a new trial is granted, or a case referred back, and a reversal of the judgment ordered, it will, of course, not conclude a subsequent action.^{100a}

^{100c} XXI Encyc. Law, 266.

Page 150, line 80, *after judgment add—*

Mr. Wells says: "Actually adjudicated issues must, in general, be involved in the final judgment in order to be conclusive. And so it has been held that an allegation of a complaint which does not enter into the judgment is not subsequently available as a bar or in evidence ^{16a}. . . . Even if matters do pass into the verdict, they do not bind unless they pass into the judgment necessarily. . . . It is the verdict with the judgment of the Court upon it which constitutes *res judicata*."^{16b}

^{16a} Sweet v. Tuttle, 14 N. Y. 469.

| ^{16b} Wells Res. Jud. 240.

Page 153, *after line 5 read—*

This Explanation, however, evidently contemplates a decree being passed which does not expressly grant a certain relief, and it lays down that such relief must in that case be deemed to have been refused. Where therefore a suit is not heard and determined, but allowed to be withdrawn, though without leave to bring a fresh suit, Sec. 13 and this Explanation can have no application.^{20a}

^{20a} Kamini Kant Roy v. Ram Nath, I. L. R., XXI Cal. 205.

Page 154, Line 16 *after in add—*

Jiban Das v. Durga Persad,^{34a} that if mesne profits from date of dispossession up to the date of the suit were claimed in a former suit, and there was no enquiry or mention as to them in the judgment, a claim for them in a subsequent suit would be barred. It was argued that Explanation III "is meant only to bar so much of the claim as is expressly dealt with in the judgment but is not referred to expressly in the decree. Banerjee, J., however, in delivering the judgment of the Calcutta High Court, said: "We find neither reason nor authority for such a contention. If any matter is expressly dealt with in the judgment, the principle of *res judicata* would apply to it, notwithstanding that the decree does not refer to it expressly, by reason of the express words in the enacting part of Sec. 13; and if the object of Explanation III was merely to prohibit the trial in a second suit of an issue already tried and determined in a former suit, notwithstanding the absence of any allusion in the decree to the matter so dealt with, Explanation III might as well have not been given." It has even been held in

I. L. R. XXI Cal. 252.

Page 158, line 2, *at the end of the para, add—*

And the identity of the parties to a former suit may be shown by evidence *aliunde* where it is not established by the record.^{6b}

^{6b} Garwood v. Garwood, 29 Cal. 514.

Page 158, line 31, *after judgment add—*

In *Wood v. Ensel*,^{15a} the plaintiff was not a record party in the former suit, but it appeared that he was an active participant in its trial, appearing as a witness, claiming the property in dispute as his own, and in the absence of the record plaintiff (who claimed to hold only as the bailee of the present plaintiff), assuming control and direction of the case, and employing and paying attorneys to attend to it, it was held that such facts brought him very clearly within the definition of a party.

^{15a} 63 Mo. 194.

Page 161, *after line 20. add—*

In *Central Baptist C. & S. v. Manchester*,^{35a} Matteson, C. J., in delivering the judgment of the Supreme Court of Rhode Island, after referring to several cases, said: "It is evident from these authorities that it is not sufficient to conclude a party by a judgment in a former suit against his servant, agent, or employee,

to which he was not a party of record, that he employed an attorney who was present for him and participated in the trial, since to bind one, not a party of record, by a former judgment, it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defence of some interest in the subject of the suit, or to avert a liability he may be under to indemnify the defendant against an adverse judgment."

^{55a} 33 Am. St. Rep. 893.

Page 161, footnote 33, for A.M., read Am.

Page 164, line 3, after suit,⁵³ add—

In *Sinclair v. Sinclair*, Parke, B., said: "The parties to a suit are the plaintiff and defendant, and that a *prochein amy* is not a party to the suit, but simply a person appointed by the Court to look after the interests of the infant, and manage the suit for him." Pollock, C. B., in that same case said: "It appears to me that the view taken by this Court, in the case of *Morgan v. Thorne*, ^{53a} is perfectly correct; that he is not a party, but is merely to be considered as an officer of the Court, specially appointed by them to look after the interests of the infant."

^{53a} 7 M. & W. 400.

Page 164, line 33, for error. read error, ^{55a}

Page 164, footnotes, add—

^{55a} Vide to same effect. *Joyce v. McArroy*, 89 Am. Dec. 172; *v. Laher*, 74 Am. Dec. 291; *Loyd v. Malone*, 74 Am. Dec. 179; *Kuchenbeiser v.*, 41 Ill. 172; *McLemore v. Chicago R. Co.*, 58 Miss. 514.

Page 166, line 20, after null. add—

Mr. Robbins in his article on Judgments says^{67a}: "A judgment rendered against an infant on confession or default, or on an appearance by an attorney, or without the appointment of a guardian *ad litem*, is erroneous but not void.^{67b} The record must show, however, that the infant was made a party to the action in legal manner.^{67c}

XII Encyc. 87.

Vide *Allman v. Taylor*, 101 Ill. 185.

Grantham v. Kennedy, 91 N. Car. 148.

Townsend v. Cox, 45 Mo. 401.

Montgomery v. Carlton, 56 Tex. 36

McLemore v. Chicago R. Co., 58 Miss. 514.

Sharp v. Findley, 71 Ga. 654.

Emerio v. Avarado, 64 Cal. 531.

^{67c} *Coleman v. Coleman*, 28 Am. Dec. 86.

Shaefer v. Gates, 38 Am. Dec. 164.

Pond v. Doneghy, 18 B. Mon. 558.

Hunter v. Hatton, 45 Am. Dec. 117.

Page 166, line 30, for void, read void.^{72a}

Page 166, footnote 68, for 45 M., read 45 Mo.

Page 166, footnotes, at the end add—

^{72a} *Sacramento Savings Bank v. Spencer*, 53 Cal. 737.

Foster v. Jones, 23 Ga. 168. *Johnson v. Pomeroy*, 31 Ohio, 247. *Wood v. Bayard*, 68 Pa. St. 320. *Campbell v. Kuhn*, 45 Mich. 513.

Page 172, line 9, after themselves.

In *Harvey v. Osborne*,^{95a} the Indian Supreme Court said: "Where two parties are sued in the same action, and one files a separate answer to the complaint, and not in the nature of a cross-complaint against his co-defendant, such co-defendant cannot, under our code of practice, demur or reply to or join issue in any manner upon such separate answer. And in such a case the finding and judgment of the Court, on an issue joined in such separate answer by the plaintiff, will not necessarily conclude and determine any of the merely relative rights of the defendants as between themselves."

^{95a} 55 Ind. 535.

Vide to same effect.

| *Goodnow v. Stryker*, 62 Iowa, 221.

Page 172, footnote 94, at the end add—

McMahon v. Geiger, 39 Am. Rep. 489. *Rice v. Outler*, 84 Am. Dec. 747. *Torrey v. Pond*, 102 Mass. 355.

Page 172, footnote 95, for 35 Ala. 312. read—73 Am. Dec. 491.

For Dunean read Duncan

Page 175, footnote 13, for 29. read 41.

Page 177, at the end add—

Mr. Wells says^{27a}: "The relative position of the parties to the record in the two actions is not regarded as material. They may be respectively plaintiff and defendant, and defendant and plaintiff, without altering the result of the first litigation between them ^{27b}; because it is nevertheless an issue between the parties."

^{27a} Wells Res. Jud. 16.

| ^{27b} *Barker v. Cleveland*, 19 Mich. 235.

Page 178, line 36, *after* decision."

In *Thompson v. Roberts*, ^{32a} Grier, J., in delivering the judgment of the United States Supreme Court said: "No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree because others having an interest in the question or subject-matter were admitted by the practice of a court of chancery to assist on both sides. The question, as between the present parties, is *res adjudicata*, and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule having no foundation in reason, making a distinction where there is no difference."

^{32a} 24 How. 241.

Page 180, *after* line 36, *read*—

In *Leggett v. Great Northern Ry. Co.*, ^{43a} Quain, J., said: "It is generally put in the books that the plaintiff must not be only the same person, but he must be suing in the same right. I think that in these two actions before us, although the administratrix nominally is the plaintiff, yet the administratrix is not suing in these two actions in the same right, but in very different rights altogether, and, therefore, that the estoppel does not arise. The present action which is now before us is an action by an administratrix in the ordinary sense of that word, representing the estate of the intestate and in point of fact bringing an action for a loss to that estate But, when we come to look at the previous action it seems to be an entirely different kind of thing. (Having been brought under Lord Campbell's Act, which) gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. The Act merely says that the nominal person to bring the action on behalf of certain relations—not on behalf of the next-of-kin or the creditors of the deceased, but on behalf of the beneficiaries, certain relations named in the Act—shall be the executor or the administrator. It is plain, therefore, that an action brought by the person designated by the statute, is brought in an entirely different right from that in which the action is brought by the executors generally as representing the estate of the testator or the intestate. I therefore feel clear upon the point that these actions are not brought in the same right, and that, therefore, the finding in the one does not constitute an estoppel in the other." In the United States also, often a suit is brought in an individual capacity, and another in an official or fiduciary character without the interference of the doctrine of *res adjudicata*. ^{45b} It is of no consequence that the plaintiffs made them thus parties as judgment-creditors, and in ignorance of their chattel mortgage. The plaintiffs in this suit were not ignorant of the existence of their own mortgage, and they knew that the plaintiffs in that suit claimed a prior lien upon the property in question therein, and were seeking to enforce it against them and all subsequent incumbrancers, or to cut off all subsequent liens of whatever nature. They were called upon to set up their claims and assert their rights, and omitted to do so, and suffered the plaintiffs in that suit to take the said decree and proceed to execute the same It is suggested that the said judgment and decree are not conclusive, because the plaintiffs were made parties as judgment-creditors. I do not think this position at all tenable. The plaintiffs were made parties as subsequent incumbrancers; it matters not what their liens were; they had an opportunity to set them up and litigate the question in that suit.

^{45a} 1 Q. B. D. 599.

^{45b} *Flint v. Bodge*, 10 Allen, 128.

Neille v. Neille, 80 N. Y. 352.

Bradley v. Andrews, 51 Vt. 525.

Karr v. Parks, 44 Cal. 46.

v. Chicago R. Co., 45 Wis.

Page 182, line 19, *after* his father. *add*—

The plaintiff in such a case, may no doubt be said to be claiming under a different title, but he can hardly be said to be suing in different capacities. This was the view taken in *Benjamin v. Elmira*, ^{59a} in which a suit by a person was held to be barred, because in a former suit against him on a certain title he had not pleaded his other title in defence; and Smith, J., in delivering the judgment of the New York Supreme Court, said: "If there is anything in the principle that when a party is brought into court and given an opportunity to present his claims, he must do so at the peril of being cut off and foreclosed in respect to all such claims, the plaintiffs are clearly estopped from going back of this decree. They were subsequent incumbrancers upon the property in question."

^{59a} 49 Barb. 448.

Page 186, line 4, *for* Doo *read*—Doc dem Foster

Page 186, line 7, *for* from *read*—for

Page 186, line 7, *for* to be *read*—in

Page 186, line 10, *for* subsequent *read*—subsequently
footnote 81, *for* 768, *read* 790.

Page 189, footnote 6, omit—*Philipson v. Earl of Egremont*, 6 Q. B. 587.

Page 191, line 29, for The decision in *Nugenderchunder Ghose v. Kaminee* is not read—

In *Hari Nath v. Mothurmohun*,^{2a} the defence was that a suit, brought by the plaintiff's mother, in her lifetime, against the same defendant, for her share, had been dismissed by a final judgment on the ground of her claim having been barred by limitation; and their Lordships of the Privy Council held that the decree dismissing the daughter's claim as barred was binding on her son; and Sir R. Couch, after referring to their Lordships' decisions in *Katama Natchiar v. Raja of Shiragunga Case* and in *Aumrtolall v. Rajoneekant*^{2b} said: "The estate to which S. as the survivor of the daughters succeeded was similar to the estate of a widow, and the principle of these decisions applies equally to it." In *Chukkun Lal Roy v. Lolit Mohan Roy*,^{2c} a Division Bench of Calcutta High Court held that the dismissal of a claim by a widow to her deceased husband, on the ground of the validity of the will against which she claimed, would not bar a suit after her death by the next reversioner claiming on the same ground against the will. It was contended that as the widow fully represented the estate, and as the question of the validity of the will was raised in issue in the previous case, the decree dismissing her claim operated by way of *res judicata* against the suit of the reversioners. The contention was overruled, however, on the ground that it proceeded upon the assumption that the widow (R.) did represent the estate of S. (the deceased testator). Ghose, J., in delivering the judgment of the Court said: "Under the will and codicil, the person who represented the estate was certainly not R. The suit was not one for the construction of the will and codicil, and all the parties interested were not parties to that suit; and it seems to me that it would be stretching the doctrine of *res judicata* to an unreasonable extent if we were to hold that, notwithstanding the widow of the deceased did not represent the estate." Nor is the decision in *Nugenderchunder Ghose v. Kaminee Dossee*³

^{2a} 1. L. R., XXI Cal., 8.
^{2b} L. R. II I. A. 113.

^{2c} 1. L. R., XX Cal., 906.

Page 192, line 39, after reversioner. add—

On the same principle, Earl, C. J., in delivering the judgment of the New York Supreme Court in *Kent v. Church of St. Michael*,^{11a} said: "Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the Courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for, if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons."^{11b} So also, in *Bayleor v. Dejarnette*,^{11c} the Supreme Court of Virginia said: "It is well settled that it is not necessary that remaindermen after the first estate of inheritance should be made parties, and where real estate is in controversy which is subject to an entail, it is sufficient to make the first tenant in tail *esse* in whom an estate of inheritance is vested a party, with those claiming prior interests without making those parties who may claim in remainder or reversion after such estate of inheritance. And a decree against such tenant-in-tail will bind those in reversion or remainder, although, by the failures of all the previous estates, the estates in remainder or reversion might afterwards become vacated."

^{11a} 32 Am. St. Rep. 993.

^{11b} Calvin on Parties 48. Wills v. State, 6 Ves. 493.
Gaskell v. Gaskell, 6 Sim. 643.

No line v. Greenfield, 34 Am. Dec. 363.
^{11c} 13 Gratt. 152.

Page 192, footnote 8, for *Ifflu* read *Ifflu*

Page 194, Line 34, after successors. add—

Mr. Robbins in his article on Judgment says^{16a} :—"A judgment for or against an Officer affecting the rights and privileges of the office is binding upon his successors. A judgment for or against his right to hold the office is binding upon those who claim under him."^{16b} . . . But a judgment against one who draws in question the right to an office or franchise is not conclusive against another person drawing such right in question.^{16c}

^{16a} XII Encyc. Law, 99.

^{16b} King v. Grimes, Buller's N. P. 231.

^{16c} State v. Cincinnati Gas Co., 18 Ohio, 232.

Page 196, line 17, after co-tenants." read—The same has been held in other cases also.^{21a}

Foot-note 20, add at the beginning—*Surender Nath v. Brojo Nath*, 1. L. R., XIII Cal., 352.

Page 196, Footnotes, *after* footnote 21 *add*—

^{21a} *Walker v. Perryman*, 23 Ga. 309. *Bass v. Serier*, 58 Tex. 567. *Gervish v. Bragg*, 55 Vt. 329. *Bennett v. Hethington*, 16. S. & R. 195.

Page 198, Line 4, *after* them. *insert*—In *Steele v. Lineberger*,^{22a} the Pennsylvania Supreme Court said: "A judgment against an administrator is conclusive as to the personal estate, but only *prima facie* as to the realty. Heirs and devisees have a right to a day in Court before their interests can be affected by a judgment against the administrator, and they may question and disprove any and every item included in or constituting the judgment against the administrator, if they can." Mr. Flint directly says: "The administrator has an interest directly adverse to the heirs in realty, instead of being privy to them. If the administrator brings a suit directly for the heirs and to their benefit they may be estopped by it."^{22b}

59 Pa. St. 313.

| ^{22b} XXI Encyc. Law, 155.

Page 199. Line 36 to executors. as note. *add*—

In the case cited, the United States Supreme Court said: "Notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor qualified in a different State from that in which the judgment was rendered."

Page 200, Line 5, *after* jurisdiction." *add*—

Mr. Robbins in his article on Judgment says:^{42a} "A judgment for or against an executor is conclusive evidence for or against another executor under the same will who has qualified in the same State."^{42b} A judgment against executor or administrator is not binding upon an executor or administrator who has qualified in another State.^{42c}

^{42a} XII. Encyc. Law, 91.

^{42b} *Wolfinger v. Betz*, 60 Iowa, 594.

Steele v. Lineberger, 59 Pa. St. 308.

^{42c} *Thatchell v. Berney*, 65 Ala. 39.

McLan v. Meek, 18 How. 16.

Taylor v. Barron, 35 N. H. 84.

Page 202, Footnote 55, *for* 706. *read* 635.

Page 203, Footnote 62, *for* 296. *read* 246.

Page 204, Footnote 71, *for* S. 707 *read* 637.

Page 200, *after* Line 15, *add*—

Thus in *Valentine v. Mahoney*,^{43a} it was held that in an action of ejectment against a tenant, the landlord would be concluded by the judgment as fully as if he were a formal party, provided he had put his title in issue, and assumed the defence, under notice by the tenant, and with the tenant's permission. Rhodes, J., in delivering the judgment of the Court in that case said: "A possible future controversy between the landlord was not the only or the principal purpose in view in securing to the landlord the right to defend the action in the tenant's name, but it was that the issue between the plaintiff and the landlord's title might be litigated and determined. If judgment when for the plaintiff would not bind the landlord, he could not avail himself of its benefits when it was for the tenant. It is impossible to conceive that the Courts should concede to a person the right to participate in an action without his being bound or benefited by its results." Mr. Wells says^{43b}: "The general rule deducible from the authorities is, that the tenant is bound by the landlord's prior acts and probably by the landlord's subsequent loss of title on grounds pre-existing the lease, while the landlord is bound by proceedings against his tenant only so far as he has notice thereof and is admitted to defend therein." Similarly, Mr. Robbins in his article on Judgment says^{43c}: "A judgment against a lessor is binding upon a subsequent lessee,^{43d} but not upon a lessee in possession when the action was commenced."^{43e} The lessor is not concluded as against the successful party by a judgment against his lessee,^{43f} unless the issue involved the title to the land in defence of it."

^{43a} 37 Cal. 394.

^{43b} Wells Res. Jud. 69.

^{43c} XII Encyc. Law, 95.

^{43d} *Bennett v. Couchman*, 49 Barb. 73.

^{43e} *Satterlee v. Bliss*, 36 Cal. 459.

Georges v. Hufschmidt, 44 Mo. 179.

^{43f} *Chant v. Reynolds*, 49 Cal. 218.

Bartlett v. Boston Gas. Light Co., 122 Mass. 209.

Read v. Allen, 58 Tex. 380.

Ryers v. Ripley, 25 Wend. 432.

Kent v. Lasley, 48 Wis. 257.

Page 205, Line 32, *for* other cases, *read*—other cases.^{79a}

Page 205, Footnotes *add*—

^{79a} *Miller v. White*, 50 N. Y. 137. *Merchants Bank v. Chandler*, 19 Wis. 434. *Lamar Ins. Co. v. Gulick*, 102 Ill. 41. *Wilson v. Pittsburgh Coal Co.*, 43 Pa. St. 424.

Page 205. Footnote 81, at the beginning add—

Will v. Dudley, 39 Am. Dec. 750.

Page 205. Footnote 82, at the end add—

Hudson v. Carman, 41 Me. 84. *Hamilton v. Glenn*, 85 Va. 901. *Lymon v. Faris*, 53 Iowa, 498. *Morris Co. v. Hinchman*, 31 Kan. 729.

Page 206, Line 2, after Courts,⁸⁴ add—

Even the New York Supreme Court appears to have taken the same view in later cases.^{84a}

^{84a} *Stephens v. Fox*, 83 N. Y. 312.

Page 206. Footnote 83, for 9 Sup. Ct. R. 739, read—

131 U. S. 329. *Glenn v.*
135 U. S. 533.

Page 206. Footnote 84, for El. read El. N. S.

Page 206. Footnote 88, after Mor. read—Corp.

Page 207. Line 22, at the end of Section add—

So also, as pointed out by Mr. Wells,^{81a} "A corporation has no such privity with the persons composing it that a suit by the latter in their individual names, though styling themselves trustees of the corporation, will debar a suit on the same cause of action—as, for example, title to lands—brought subsequently by the corporation."

Wells *Res. Jud.* 152.

Page 210, marginal note, for jointly interested read—having similar interest.

Page 210. Footnote 5, at the end add—*Kerr v. Blodgett*, 48 N. Y. 66.

Page 211, top heading for jointly interested read—having similar interest.

Page 211. Line 6, after the rest. add—

In *Commissioners of Sewers v. Gollatly*,^{8a} Sir George Jessel, M. R., citing *Mayor of York v. Pilkington*,^{8b} said: "He understood the rule of the Court of Chancery, ever since Lord Hardwicke's time, to have been this, that where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right—and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number—some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted. No doubt the Plaintiffs must have the right of selecting the Defendants unless the persons interested in resisting the claim chose to file a bill to establish their rights, in which case the two suits would go on together as cross-suits."

^{8a} 3 Ch. D. 610.

| ^{8b} 1 Atk. 382.

Page 211 Footnote 10, for VII. A., read—VI. I. A.

Page 217, Line 1, after Kesavan⁸¹. ad d—

Referring to the Full Bench decision and to the decision in *Sridevi v. Kellu Eradi*, Sir Arthur Collins, C. J., and Sheppard, J., held in *Chalapreth Komappan v. Ukkaran*, that Sec. 30 did not apply, and said:—"It has been more than once decided that although the members of a tarwad or family may in an irregular fashion be represented by a Karnawan of the tarwad, the decree does not raise an absolute estoppel against members not actually brought on the record."

Page 218, Footnote 35, for 85. read 35.

Page 223, footnote 49, for S read U. S.

Page 227, Footnote 76, omit—*Heard v. Lodge*, 32 Am. Dec. 197. *Irwin v. Backus*, 85 Am. Dec. 125.

Page 229, line 2, after litigation." read—It is a general rule, that if the purchaser or any subsequent vendee, is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor."

Page after 231, Line 13.

In *Spencer v. Dearth*,^{91a} Wilson, J., in delivering the judgment of the Vermont Supreme Court said: "Where the defendant in the second action had notice of the former suit and an opportunity to make defence, or where the defendant in the second action voluntarily appeared and assisted in the former proceedings or in case of a payment made by a co-contractor, who is a party of record in the second, but was not in the first action, or a release to him of the whole cause of action, or accord and satisfaction, where either of such matters is presented in the form by the party therein, and urged for himself and through his agency for and on another party not on the record, but having a direct interest arising from or by operation of law to prosecute or defend the suit, and the same is prosecuted or defended with his express or implied countenance, such judgment is conclusive evidence in the second suit of the matters so adjudicated in the former action."

^{91a} 43 Vt. 93, 104.

Page 231, after Line 33, add—

"In suits for contribution also, the question turns upon notice, because if the party asking contribution had proper notice of the former suit and an opportunity to join in a defence, the judgment in that suit will be *res judicata*."^{92a}

^a Fletcher v. Jackson, 56 Am. Dec. 98.

Kramph v. Hatz, 52 Pa. St. 529.

Preslar v. Stallworth, 37 Ala. 402.

Page 232, Line 2, after money. add—

And that remark was quoted with approval in *Gibson v. Lorc*,^{94a} with the observation that "it has been adopted by able legal writers as a cardinal principle, settling that doctrine upon this matter, and has also received the sanction of decisions of Courts of the highest respectability." It was also cited with approval by Parke, B., in *Smith v. Compton*,^{94b} in which Lord Tenterden, C.J., further said: "The only effect of want of notice in such a case as this, is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given him."

^{94a} 2 Flor. 616.

^{94b} 3 B. & Ad. 407.

Page 232, Line 10, after to defend⁹⁵. add—

Ruger, C. J., said: "The liability of the author of the act which occasions the injury, does not depend upon the fact of his receiving notice of the action brought by the injured party against the municipality . . . the only object of notice in such a case is to enable the corporation to avail itself of its right to impose the burden of defence upon the party ultimately liable, and to estop the author of the injury by the judgment recovered, from again contesting the facts upon which judgment depends. The omission to give notice in such cases does not go to the right of action, but simply changes the burden of proof, and imposes upon the party against whom the judgment was recovered, the necessity of again litigating and establishing all of the actionable facts. But if the party who is ultimately responsible has notice of the pendency of an action against his indemnitee, and is given an opportunity to defend, and neglects it, he is still bound by the result of the action and estopped from controverting in an action subsequently brought against him by such indemnitee, the facts which were litigated in the original action."

⁹⁵ 96 N. Y. 550.

Page 233, Line 6, after estopped, read—that notice need not be direct or actual, and that circumstances amounting to notice or actual knowledge that the suit is pending may be sufficient to charge the indemnifying party.

Page 233. At end of the note add—

Mr. Flint says^{96a} :—"The notice may be either express or implied, direct or indirect, actual or inferential, and if it can in any way be brought home to them they (the sureties) are regarded as charged with notice," but he himself adds further on^{96b} that the notice must be certain, explicit, and unequivocal.

^{96a} XXI Encyc. Law, 169.

^{96b} XXI Encyc. Law, 172.

Page 235, Footnote 16, omit—*Pritchard v. Hitchcock*, 6 Man. & G. 154.

Footnote 18, for Niv. read Nav.

Page 236, line 30, after any other. add—

Mr. Robbins in his article on Judgment enunciates the entire rule as follows^{94a} :—"A judgment for or against a bailor is conclusive upon the bailee.^{94b} A recovery and satisfaction by either bailor or bailee is a bar to a subsequent action by the other; but a recovery and satisfaction by the bailee has been held not to bar an antecedent action by the bailor.^{94c} Judgment against a bailee is not a bar to an action by the bailor against the successful party. But judgment against a bailee in an action defended by the bailor is binding upon the latter."^{94d}

^{94a} XII Encyc. Law, 93.

^{94b} Green v. Clarke, 12 N. Y. 343.

Burton v. Wilkinson, 18 Vt. 186.

^{94c} Steamboat Farmer v. McCraw, 31 Ala. 659

^{94d} Tarleton v. Johnson, 25 Ala. 300.

Page 236, footnote 25, for Young *Ex parte* 17 Ch. D. 668, read—*Candee v. 2 Comst.* 274.

Page 238*b*, footnote 10, for O read 462.
it 46.

Page 239, Line 2, for passing read pronouncing

Page 255, Footnote 52, for Sadanaud read Sadanand

Page 256, Footnote 54, for 11 read 414.

Page 261, Top Heading, for some read—same

Page 263, line 26, add as a note to Exeter—

Lord Romilly, M. R., in this case said :—" If the decision (of the Club) has been arrived at *bonâ fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal. None but the members of the club can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce this court to interfere." The same was held by the court of appeal in *Dawkins v. Antrobus*,^{90a} in which Lord Justice Brett said :—" The only question which a court can properly consider is whether the members of the club, have acted *ultra vires* or not, and it seems to me the only questions which a Court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club—in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person who has not condoned the departure from them has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bonâ fide* or not. The Court has no right to consider whether what was done was right or not, or, even as a substantive question, whether what was decided was reasonable or not." In *Gompertz v. Goldingham*,^{90b} the Madras High Court set aside as wrongful the expulsion of a member of the Bellary Club from it, but on the ground that the charge on which he was expelled had not been brought to his notice. The Privy Council has taken a similar view in regard to religious associations also. Thus in *Long v. Bishop of Cape Town*,^{90c} their Lordships said :—" The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other Communion may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice." This was adopted by their Lordships in *Brown v. Cure of Montreal*,^{90d} in which it was held that burial to a Roman Catholic in a certain cemetery reserved for members of that faith was improperly refused under the orders of the Bishop. Mr. Justice Berthelot in the Court of Review in Lower Canada said : '*Le baptême, le mariage et la sépulture sont de matiere mixte, et les ecclesiastiques ne peuvent se refuser de les administrer à ceux de leur paroissiens qui y ont droit, comme résidants dans l'enclave de sa paroisse, à moins cependant qu'il n'y ait des peines ecclesiastiques prononcées contre eux par l'évêque ou autre autorité ecclesiastique compétente.*' Their Lordships expressing concurrence with that, added : " If this passage is to be taken to imply that it is competent to the bishop to deprive a Roman Catholic subject of his rights by pronouncing against him *ex mero motu* ecclesiastical penalties, their Lordships are of opinion that the proposition is too wide. They conceive that, if the act be questioned in a Court of Justice, that Court has a right to inquire, and is bound to inquire, whether that act was in accordance with the law and rules of discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by an authority competent to pronounce it."

17 Ch. D. 680.
I. L. R., IX Mad., 319.

^{90c} 1 Mo. P. C. (N. S.) Cas. 461.
^{90d} L. R. 6 P. C. 157.

Page 264, at the end of page *add*—

The same view has been taken recently in *Kanji Barla v. Arjun*,^{96a} by Starling, J., who said:—"I think this case is on all fours with that of *Sudharam v. Sudharam*,^{96b} where the plaintiff had invited the defendants to a dinner party, which invitation they had accepted, but did not come. At the end of his judgment, Bayley, J., after citing *Joy Chunder v. Ramchurn*^{96c}, said: "No decree can be executed declaring a person's right to the membership of a society, as the effect of such a decree would be to require that other persons do accept the plaintiff's invitation and do partake of his food though against their will, and that they in their turn must give him similar invitations and dine with him whether they like to do so or not." This case was cited and followed in *Raghunath v. Janardhan*,^{96d} wherein the case of *Shankar v. Hanma*^{96e} was also cited. I think these cases and the majority of the older cases, collected and reported in 8 Beng. L. R. (A. J.) 91 show that the present suit is not maintainable, as the decree to be of any effect would have to declare that all members of the *Kharra* caste whom the plaintiff chose to call to his house on the occasion of a death in his family, must go, whether they were willing or not; and that the defendants were never to state any reason to any of their fellow-members why they should not accept the plaintiff's invitations, and I fail to see how such a decree could be enforced. If the defendants are in fault at all it is because they have broken some social rule of the caste, and in such a case it is to the caste the plaintiff must go for redress. There is no question of property involved, nor can I see that the defendants have by their alleged acts slandered the plaintiff so as to give him a right to sue for damages."

^{96a} 1. L. R., XVIII Bom., 115.

^{96b} III B. L. R. A. J. 91.

^{96c} VI W. R., 325 C. R.

^{96d} 1. L. R., XV Bom., 599.

^{96e} 1. L. R., II Bom., 470.

Page 278, Line 1, *after* country. *add*—

The decision in *Peary Mohun v. Ali Sheikh*,^{96d} is really not against this view, as it proceeded on the ground that Sec. 158, Bengal Tenancy Act (VIII of 1885) applies only in case of an admitted tenancy, Pigot and Rampini, JJ., observing that—"It may, no doubt, be said that when the section gives the Court power to determine the name and description of the tenant (if any), it gives it authority to decide such a dispute: for, if there be such a dispute, the name and description of the tenant cannot be decided without enquiring into and deciding the dispute. But we are of opinion that such an issue can only be decided collaterally, and that it does not arise between the parties in a proceeding under Sec. 158, in such a manner as to make the decision upon it *res judicata* between the parties in a subsequent regular suit. . . . Cl. (b). . . . was not intended to, and does not, authorize the Court to decide conclusively disputes as to who is the tenant, or as to who is entitled to the occupation of the land."

Page 287, line 39, *after* States. *read*—

It is a general rule, however, that the jurisdiction of the Superior Courts cannot be taken away by statute except by express words or necessary implication^{96a}. Besides, judicial power and jurisdiction is not in its nature exclusive, and may be possessed at the same time by different courts; and Mr. Guz in his article on Jurisdiction says^{96b}: "A grant of jurisdiction to one Court, even if it be of the same character as that possessed by another, does not repeal the first grant, but renders the tribunals in which it is vested courts of concurrent, not of exclusive jurisdiction^{96c}." Even if exclusive jurisdiction is given to a court, the grant will not affect the jurisdiction over the proceedings pending at the time of the grant before any Court; and that Court can continue to act in them^{96d}.

^{96a} State v. Moore, 19 Ala. 514.

Commonwealth v. McCleskey, 2 Rawle, 369.

^{96b} XII Encyc. Law, 304.

^{96c} Hays Admx. v. Mc Neely, 16 Fla. 409.

Bedwell v. Jones, 9 Lea. 168.

^{96d} Anderson v. Henzey, 7 W. N. Pa. 39.

Page 289, Line 29, *after* petition. *read*—

The Supreme Court had held in *Tarbox v. Kennon*,^{96a} that if the plaintiff should have erroneously stated his case in order to give the court jurisdiction, the case should be dismissed.

^{96a} 3 Tex. 7.

Page 289. Line 38, *after* jurisdiction." *add*—

In *Martin v. Goode*,^{96a} the claim was against two different items, and Clark, J., in delivering the judgment of the North Carolina Supreme Court said:—"It is the sum demanded in good faith which is the test of jurisdiction. Though there may be several causes of action, each of which is for less than two hundred dollars, the superior court has jurisdiction whenever the causes of action are such as can be joined in the same action.^{96b} Should the sum demanded be reduced under two hundred dollars by failure of proof, or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted^{96c}: except when the sum demanded is so palpably in bad faith as to amount to a fraud on the jurisdiction, or where there is a misjoinder of parties^{96d}."

^{96a} 32 Am. St. Rep. 799.

^{96b} State v. Roberts, 108 N. C. 174.

Usry v. Suit, 91 N. C. 406.

Brickell v. Bell, 84 N. C. 82.

^{96d} Mitchell v. Mitchell, 96 N. C. 14.

Page 290. *after line 15. read—*

While jurisdiction is determined by the amount mentioned in the *ad damnum* clause of the plaint, yet if during the progress of the suit an amendment is made in the amount claimed, the amendment will determine the value of the suit for the purposes of jurisdiction.^{71a}

^{71a} *Merrill v. Curtis*, 57 Me. 152.
Taylor v. Jones, 42 N. H. 25.

| *Hart v. Wait*, 3 Allen, 532.

Page 291. Line 4. *before said read—*

In delivering his judgment in *Ewart, Latham and Co. v. Muhammad Siddiq*,^{72a} (with the concurrence of Westropp, J.).
— IV B. H. C. B., 136.

Page 291. Line 5. *for Berwick read Beswick*

Page 292. Line 1. *for settled read—now settled*

Page 292. Line 10. *after jurisdiction.” add—*

In *Willard v. Collamer*,^{83a} and *Watts v. Harding*,^{83b} it was held that in actions on book accounts, jurisdiction would be determined by the amount on the debit side from date of last settlement until the institution of the suit, except that plaintiff might deduct credit and sue for balance.

^{83a} 31 Vt. 591.

| ^{83b} 5 Tex. 386.

Page 292. Line 38. *for Thus speaking read—*

There also a judgment in excess of the claim does not affect jurisdiction.^{85a} Speaking

^{85a} *Hemmenway v. Hicker*, 4 Pick 497.

Page 292. Footnote *at the end add—Williams v. Noble Brothers*, 36 Ga. 599.

Page 293. Line 17. *for Ashuelot read—Ashuelot*

Page 293. Line 27. *for Harrington read—Harrington*.¹⁷

Page 296. Line 1. *for set off read set-off*: though exactly the contrary has sometimes been held in the United States.^{26a}

| *Brier*, 87 Ind. 391.

| *Coles v. Peck*, 96

Page 296. Line 12. *at the end of section add—*

In *Abney v. Whitted*,^{27a} the demand was in excess of the court's jurisdiction, and the defendant admitted a part of it, leaving a contested balance, and the Louisiana Supreme Court held that that would not determine the jurisdiction.

^{27a} 28 La. Ann. 818.

Page 296. marginal note. *for effect read—affect*

Page 302. Line 22. *after decrees.” add—*

In a suit for preemption of certain land, the amount of money for which the sale has been made will determine the jurisdiction, and the value of the suit will not be deemed increased because the defendant has established an equitable claim to compensation for the building he has erected on the land before the plaintiff can take possession of the land and building.^{54a}

^{54a} *Hayat v. Sant Ram*, 1894 P. B. No. 20.

Page 303. Top Heading. *for in read—on*

Page 309. Line 33. *for litigation. read—*

litigation, as distinct from the price last paid for it.^{82a}

The actual value.

^{82a} *Oakey v. Hicken*, 12 La. Ann. 11.

Page 311, Line 11, *after* ascertainable."

In a suit for an account and money found due thereon, the approximate amount that the plaintiff may choose to mention in the plaint as the valuation of the claim for the purposes of the court-fee shall also determine the valuation for jurisdiction. This has been held directly in *Bhagwantrao v. Mehta bajurao*,^{87a} in which the plaintiff valued the relief sought at Rs. 130, stating at the same time that he would pay Court-fee on any larger amount that might be decreed. This decision was with reference to Sec. 8 of the Suits Valuation Act, but the same had been held before in *Khushalchand v. Nagindas*,^{87b} in which case also the plaintiff prayed that an account should be taken of all the business done by the defendants and that whatever was found due should be awarded to them with interest; and the relief sought had first been valued at Rs. 130, and afterwards raised to Rs. 510, to avoid the suit being treated as one cognizable by a Court of Small Causes. Birdwood, J., in delivering the judgment of the Court said:—"The approximate amount stated in the plaint must be taken to be the amount or value of the subject-matter of the suit for purposes of jurisdiction." So also, the same rule was held to apply in *Gulabsingji v. Lakshmansingji*,^{87c} in which the plaintiff had sued for a declaration of his title to a share in certain estates, and for an injunction to restrain defendant from cutting certain timber from certain portions of the estates, and in default of an injunction for an order to defendant to keep a correct account of the timber removed; and the plaintiff having valued the suit at Rs. 230, that amount was held to determine the question of jurisdiction for the purposes of appeal.

^{87a} I. L. R., XVIII Bom., 40.

^{87b} I. L. R., XII Bom., 675.

^{87c} I. L. R., XVIII Bom., 100.

Page 314, footnote 99, *for* 624. *read*—524.

Page 315, line 10. *for* This decision *read*—
The decision of the Allahabad High Court referred to above

Page 315, footnote 5, *for* X All. *read*—XIII All.

Page 316, line 3. *for* jurisdiction *read*—jurisdiction.^{8a} Interest accrued prior to the bringing of a suit will however go towards determining jurisdiction,^{8b} though the contrary has sometimes been held^{8c}.

^{8a} *Trego v. Lewis*, 58 Pa. St. 463.

Mitcheltree v. Sparks, 1 Scamp. 198.

^{8b} *Butler v. Wagoner*, 35 Wis. 54.

St. Amond v. Gerry, 2 N. & M. 487.

^{8c} *Hedgecock v. Davis*, 64 N. Car. 650.

Jackson v. Whitfield, 51 Miss. 202.

Welch v. Karstens, 60 Ill. 117.

Solomon v. Reese, 34 Cal. 28.

Fowler v. Bishop, 32 Conn. 199.

Inhabitants v. Weir, 9 Ind. 224.

Page 319, footnote 3. *For* 618. *read* 249.

Page 319, Line 17, *after* defendants *add*—

Page 321. *Omit* footnote 8.

Page 322. Footnote 25, *for* 241. *read* 244.

Page 326. Footnote 34, omit—*Buenos Ayres Ry. v. Northern Bu. Ay. Ry.* 2 Q. B. D. 210.

Page 334, Footnote 54. *for* 80 *read* 30.

Page 335. Line 13. *after* complete." *add*—

In *Paget v. Ede*,^{54a} it was contended that "as no instances are referred to of a decree for foreclosure of land in one of the colonies, therefore the court has no jurisdiction to make such a decree." Sir James Bacon, V. C., said, however, "that it is a jurisdiction which has been very frequently employed in the case of appointing receivers of mortgaged estates in the colonies, and as I cannot entertain any doubt that the court has a right as between the English mortgagor and the English mortgagee to enforce that personal contract between them, although one of the consequences of it may be to vest in the plaintiff the absolute interest in the mortgaged estate, which at present is qualified only by the existence of the equity of redemption. I cannot hesitate for a moment in saying that the suit which is brought for the purpose of having the account taken, of realizing the estate if it should be necessary, and giving to the mortgagor the opportunity of redeeming it if he thinks fit to do so, is properly brought in this court."

^{54a} 18 Eq. 118.

Page 335, Line 17. *after* Orr-Ewing, *read*—

In which case the question was in regard to the administration of personal property,

Page 335, Line 22, *for jurisdiction.*" *read*—jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in Foreign Countries."

Page 335, Line 32, *omit*—"

Page 337, Footnote 67, *for Bunce read* Bunch

Page 339, Footnote 81, *for Davis read* Davis

Page 343. *after Line 24, add*—

The question as to where a contract has been made or a breach of it has been committed is not free from difficulty, which is experienced chiefly in the case of contracts by correspondence. In *Dadabhai v. Diogo Saldanha*,^{74a} the plaintiff from Karwar sent Rs. 300 to K. carrying on business at Bombay to pay for goods ordered by plaintiff from K., and on K. not being able to supply goods, the plaintiff telegraphed to him to pay the money to D., provided he shipped the goods to Karwar, and the payment having been made before the goods were shipped, and the goods not having been shipped at all, the plaintiff sued both K. and D. for the money, and the courts at Karwar were held not to have jurisdiction over the suit, as the agreement on which the suit was based was that of shipping goods to Karwar, and D. entered into it with K. acting on behalf of plaintiff at Bombay to be performed there.

^a L. L. R., XVIII Bom., 43.

Page 344, Line 28, *for Borch, read* Borch.⁷⁷

Page 344, Line 33, *for Spittall, read* Spittall.⁷⁸

Page 344, Line 36, *for concurrence read* conference

Page 344, Lines 36 and 37, *for the latter view was adopted as the correct law, read*—

Lord Coleridge announced that "the majority of the Judges were in favor of following the decision of the Court of Common Pleas, that the judges of the Court of Queen's Bench, though still remaining of the same opinion as before, had for the sake of conformity agreed to be bound by the opinion of the majority, and that consequently in future all the Courts would act upon the decision in *Jackson v. Spittall*,

Page 345, Line 33, *for Jurisdiction, read*—Jurisdiction."

Page 349, Footnote 22, *omit*—Breull, 16 Ch. D. 487.

Page 349, Footnote 23, *for 11 J. read*—1 L. J.

Page 352, Line 24, *for the term residence has read*—

"it has been judicially decided, and I think rightly, that the words residence and business have

Page 352, Line 25, *for it read* they

Page 352, Line 26, *for it occurs read*—they occur."

Page 352, Footnote 47, *at the beginning add*—*Lewis v. Graham*, 20 Q. B. D. 780.

Page 359, line 18, *add as note after situate*.⁷⁹—

The contrary was held in *Breull* *Ex-parte*,^{79a} in which a person employed as a clerk in a Bank in London was held to carry on his business there. It was contended in that case that the words 'carries on business' should be confined to persons carrying on business on their own account as principals but the Court of Appeal overruled the contention, Lush, L. J., saying: "I think that a man carries on business at the place where he is to be found during the business hours of the day. In the present case the employment of a banker's clerk is the business of the debtor's life; he carries it on in the city of London, and the London Bankruptcy Court is his natural forum, though he resides with his mother in another district." The decision of the Court of Exchequer in *Buckley v. Hann*,^{79b} and in *Saugster v. Kay*,^{79c} were not brought to the notice of the Appeal Court, and the decision of the Appeal Court was not followed by the Court of Queen's Bench in *Lewis v. Graham*,^{79d} and the Queen's Bench decision was affirmed on appeal. Lord Esher, M. R., said: "The term 'carry on business' is a well-known term in the city of London. Certain liabilities applied to women, although they were married women, who carried on business in the City; and nobody, I should think, would doubt that the phrase as applied to them, meant the carrying on of business by a person whose business it was that was carried on. Nobody, I should think, would assert that every

shop woman in the city carried on business within the meaning of that established phraseology. I am of opinion, looking at this Act of Parliament, that we ought to give the words their primary business sense, already well-known in the city, namely, the carrying on of business by the person whose business it is. The Act meant to extend the jurisdiction of the Mayor's Court to persons who carry on some trade—not to persons who merely obey orders. If that be the true view, the words should be construed as though they had been 'provided the defendant shall carry on *his or her* business within the city of London'; and if that be so, we have two authorities, accepted and acted upon for years—acted upon indeed by the Court below in the present case—which have decided that a clerk whose only business is to obey orders does not 'carry on his business' within the meaning of those words, because it is not his business that he carries on but that of his master. The man who cuts out for his master gloves in a shop, although he does in a sense effectuate the business of the production of gloves, is not carrying on his own business but his master's.

Having regard to the object and intent of the statute with which we have to deal in the present case, which statute applies to a local jurisdiction limited by boundaries defined on the map, there is nothing to oblige us to say that the words, 'carry on business within the city of London,' should have any other than the primary and ordinary business sense which would be accepted in the city. I think that those words mean to describe a person managing or conducting his own, and not somebody else's business. He must either manage or conduct a business of his own or the business which is managed or conducted for him must be his own. I am of opinion that the words are not meant to apply to a clerk who assists another person to carry on his business, and is bound to obey his employer's orders, and has himself no control or direction with respect to that business." Similarly, Fry, J., said: "I think that the expression 'carry on business' is not ordinarily used in the sense of a person being busy or doing business merely. A butler employed to look after his master's plate and perform the other duties of his occupation may be a very busy man, but he could not be said to be carrying on business. A man who busies himself about science, the Volunteer movement, or politics, though he may have a great deal of business to transact in respect of those matters, does not carry on business. I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion it imports that the person has control and direction with respect to a business, and also that it is a business carried on for some pecuniary gain. If that be so, it seems evident that this solicitor's clerk does not carry on business in that sense. The case of *Ex parte Breull, In re Bonie*,^{79c} no doubt does at first sight seem to be contrary to the construction we are putting upon the words 'carry on business.' But the Court of Appeal were then dealing with the Court of Bankruptcy which has a general and universal jurisdiction, and they had to look at the significance of the words when used in a rule providing for the distribution of business between the London Court of Bankruptcy and provincial Courts. I think the decision proceeded on the ground that, having regard to the object and intention of the rule, the Court thought that they ought to give a secondary meaning to the words instead of their primary and ordinary meaning. They state the object and intention of the rule, and say that the words used in it are ambiguous and elastic, and they proceed to put a meaning upon them which will carry out that object and intention. I therefore think that their decision is no real authority against the construction we are putting upon the words as used in the 12th section of the Mayor's Court (Extension) Act, 1857. I think that those words ought to be construed according to their ordinary and natural meaning, which would not include a person employed as the respondent was here." So also Lopes, L. J., said: "I think that the expression 'provided that the defendant shall carry on business within the city of London' means 'provided that the defendant shall carry on *his* business within the city of London.' I also think that those words imply some control and direction with respect to the business as distinguished from mere service, employment, or occupation. A solicitor's clerk cannot, in my opinion, be said to be carrying on *his* business by assisting in carrying on the business of the solicitor. It is not the clerk's business, but the solicitor's which is carried on. If the construction for which the appellant contends were applied, every shop-assistant and every servant employed in a business in the city would be brought within the 12th section."

^{79c} 22 Q. R. D. 1.

Page 373, Line 32, *for* ineffectual. *read* ineffectual

Page 375, Footnote 54, *omit*—*Copin v. Adamson*, L. R. 9 Exch. 345.

Page 377, Footnote 67, *for* Ponnuyer *read* Pennoyer

Page 379, Line 23, *omit superior figure*—78

Page 379, Line 36, *before* existence *read* the

Page 379, *omit* Footnote 78

Page 379, Footnote 79, *for* 76 *read* 79

Page 379, Footnote 80, *for* 155. *read* 163.

Page 384, Line 11. *after* State, ' ' *add*—

Mr. Hewitt, in his article on Judge, says :
“ Such exception of ability arising out of interest or relationship is implied in the most comprehensive grant of jurisdiction by Statute or by Constitution.”

^{99a} XII Encyc. Law, 43.

Page 384, Line 37, *after* Corporation. *read*—

Mr. Hewitt, in his article on Judge, says : ^{3a}
“ The most minute interest is sufficient to disqualify, unless the objection be removed by some positive provision of law to that effect. ^{3b} Accordingly, at Common Law, citizens who were tax-payers were incompetent to sit as judges in cases in which their own town or municipality was a party in interest. ^{3c} But the interest to have such effect, must be pecuniary or property interest, or one affecting the Judge's individual rights ; and the liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of laws and government, upon the status fixed by the decision. ^{3d} Nor is the remote impersonal interest which a citizen has in the property of the State at large a disqualification ^{3e} Interest to disqualify must be direct and immediate ^{3f}. . . . In the absence of statutory provisions, prejudice not based on property interest in the Judge is not assignable as a legal cause of disqualification. ^{3g} In *Moses v. Julian*, ^{3h} bias was held by the New Hampshire Supreme Court to be a ground of objection. Bell, C. J., among other instances of good objections, mentioned the fact of the Judge or some near relative having received important public benefits or donations ; the existence of the relation of master and servant between the Judge and a party ; the existence of protection and subjection, as that of guardian and ward ; and further said : “ But a creditor, lessee or debtor, may be Judge in the case of his debtor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the Judge may depend upon the success of his suit.”

It has been held in several cases that a Judge may sit as one of the members of a higher court in review of his decision in a lower tribunal ³ⁱ.

XII Encyc. Law, 46.

Clark v. Lamb, 2 Allen, 396.

Tolland v. Commrs of Berkshire, 13 Gray, 13.

Peck v. Essex Freeholders, 21 N. J. L. 656.

City of London v. Wood, 12 Mod. 669.

Foreman v. Marianna, 43 Ark. 324. . . .

Connecticut v. Bradish, 14 Mass. 296.

^{3f} *Ellis v. Smith*, 42 Ala. 349.

^{3g} *People v. Williams*, 24 Cal. 31.

Cooper v. Brewster, 1 Minn. 94.

Allen v. Reilly, 5 Nev. 452.

^{3h} 84 Am. Dec. 114.

³ⁱ *Edward v. His Wife*, 9 La. Ann. 321

Pierce v. Delamater, 1 N. Y. 17.

Turnbell v. O'Hara, 4 Yeates, 440.

Peck v. Essex Freeholders, 1 Zab. 658.

Page 384, Footnote 99, *for* 62 Ten. *read*—62 Tex.

Page 385, Line 22, *after* void, ⁷ *add*—

Affinity to constitute disqualification must extend to the Judge himself, and it will be too remote, if extending to his relations, as where the brother of the plaintiff was alleged to have married the widow of a brother of the Judge. ^{7a} The affinity must also be a subsisting one at the time of the trial ^{7b}.

^{7a} *Carmen v. Newell*, 1 Den. ⁹⁵

1, 88.

Foot v. Morgan, 1 Hill, 654.

Matter of Dodge Mfg. Co., 77 N. Y. 101.

, 45 Ga. 414.

ge 386, last line, *for* In England, however, *read*—

Mr. Hewitt in his article on Judge says : ^{21a} “ In some of the stock-holders' cases, it has been held that disqualification through kinship is where the relative is a party ; and that as a stock-holder cannot be said to be a party to the suit of the corporation, in whose affairs his interest is somewhat remote, the Judge is competent, notwithstanding relationship to a stock-holder. Some have taken a different view. But in suits going to the life of the corporation, the stock-holder is probably a party within the rule under consideration.” Relationship to a party interested trustee is held not to disqualify. ^{21b} Relationship in equal degree to both parties, is also a disqualification. ^{21c} In England and in some of the States.

XII Encyc. Law, 47.

Fowler v. Byers, 16 Ark. 196.

Trustees of Internal Fund v. Bailey, 10 Fla.

233.

^{21c} *Beal v. Siquessfield*, 73 Ga. 48.

Page 387, line 10, *for* Court. *read*—Court,

Carpenter, J., in delivering the judgment of the Court, admitting that by the common law of that State, a Judge related to either party within the fourth degree was not qualified to sit in the cause ^{23a} said that “the judgment was voidable only, and not void.”

^{23a} *Bean v. Quimby*, 5 N. H. 94.
Gear v. Smith, 9 N. H. 63.

Sanborn v. Fellows, 22 N. H. 408.
Moses v. Julian, 84 Am. Dec. 114.

Page 388, line 14, *after* judgment. *add*—

Consultation of attorney, to procure his advice in a matter afterwards developing into a law suit, disqualifies him.^{34a} Gratuitous services are also a disqualification.^{34b} and even where the gratuitous services were by a partner, and the judge had, when attorney, no knowledge of his partner's action in the matter, the judge was held to be disqualified ^{34c}. Mr. Hewitt in his article on Judge says : ^{34d} “Disqualification of those who have been of counsel in a case applies only to counsel in the very matter before the court.”^{34e} While the meaning of the ‘cause’ or similar term has been construed with much strictness, it has not been confined absolutely to the very controversy and parties on the docket. Thus in divorce it was held that if the judge had been counsel for either party in former divorce proceedings between the two, he could not sit ^{34f}. A general retainer from one of the parties is ground for change of venue.”^{34g} Having been of counsel in other suits involving the same title to real estate has been held not to disqualify. ^{34h}

^{34a} *Slaven v. Wheeler*, 58 Tex. 23.
Curtis v. Wilcox, 41 N. W. R. 863.
Darling v. Pierce, 15 Hun. 543.
^{34c} *East Rome Town Co. v. Cothran*, 81 Ga. 380.
XII Encyc. Law, 56.

^{34b} *Bryan v. Austin*, 10 La. Ann. 612.
McFaddin v. Preston, 54 Tex. 403.
Newcome v. Light, 44 Am. Rep. 604.
Kern Valley Water Co. v. McCard, 70 Cal. 646.
^{34h} *Taylor v. Williams*, 26 Tex. 583.

Page 394, line 32, at the end of the para *add*—

In *Namasiraya v. Kadir Ammal*, ¹² the decisions in *Gorind v. Dhondharaw*, and in *Vithilinga Padayachi v. Vithilinga Mudali*, were cited evidently with approval, but the decision was based on another ground.

¹² IV M. L. J., 31.

Page 396, line 28, at the end of the para *add*—

The Calcutta High Court held the contrary, however, in *David v. Grish Chunder Guha*,^{19a} in which the former suit being for less than Rs. 100 did not admit of a second appeal; and it was contended in the subsequent suit which was for more than Rs. 100 and admitted of a second appeal, that the decision in the former suit was not *res judicata*. The High Court overruled the contention on the ground that the former suit had been decided by a Court of competent jurisdiction, observing that “the plaintiff could easily have secured his second appeal upon the point which he raises by waiting to sue until the amount sought to be recovered exceeded Rs. 100.”

^{19a} I. L. R., IX Cal., 183.

Page 397, footnote 21, *for* Beverly *read* Beverley

for Sandorn *read* Sandoval

Page 398, Line 15, *after* render it. *add*—

In *Chicago & A. R. Co. v. Summers*,^{23a} Howk, J., in delivering the judgment of the Indiana Supreme Court, after observing that “it is settled by our decisions that a judgment cannot be attacked or impeached in a collateral suit or proceeding unless it be void,”^{23b} said : “The doctrine of the cases cited, however, has no application whatever to a case where, as here, the judgment is shown by the averments of the complaint or answer to have been void.” In *White v. Foote L. & M. Co.*,^{23c} Snyder, J., in delivering the judgment of the Supreme Court of West Virginia said : “The judgment having been rendered upon the contract of a married woman made during her coverture, it is an absolute nullity, and any execution or suggestion sued out upon it was invalid and ineffectual for any purpose.”^{23d} In *Ferguson v. Jones*,^{23e} Lord, J., in delivering the judgment of the Oregon Supreme Court said that the absence of the parents' consent, required to give jurisdiction “is fatal to the validity of the decree. Hence such a decree cannot bind or estop any one, and may be collaterally assailed, whenever and wherever it may be interposed in any action.”

^{23a} 3 Am. St. Rep. 616.
^{23b} *Exchange Bank v. Ault*, 102 Ind. 322.
Baltimore R. R. Co. v. North, 103 Ind. 486.
Walker v. Hill, 111 Ind. 223.

Ely v. Board, 112 Ind. 361.
6 Am. St. Rep. 650.
^{23d} *Whitley v. Black*, 11 Am. Dec. 753.
11 Am. St. Rep. 820.

Page 398, omit footnote 26

Page 399, footnote 30, omit—*Fowler v. Brooks*, 10 Am. St. Rep. 425.

Page 406. Top Heading omit—AND PERSONAL.

Page 406, line 17, *after* brought." *read*—

Mr. Zug in his article on Jurisdiction after an observation to that effect says:^{76a} "Once vested, it is not ousted by subsequent events. Thus no change in the residence of parties can take away a jurisdiction, that has once attached."^{76b}

76a XII Encyc. Law, 905.

76b Raymond v. Butterworth, 139 Mass. 471.

United States v. Dawson, 15 How 407.

Culver v. Woodruff Co., 5 Dill (U S) 392.

Gilmer v. Grand Rapids, 16 Fed. Rep. 703.

Page 408, Line 33, at the end of the para. *add*—Nor does the citizenship of the representative affect the jurisdiction in such a case.^{91a}

91a Clarke v. Matthewson, 12 Pett 164.

Upton v. New Jersey, 25 N. J. Eq. 373.

Page 409, footnote 97, at the end *add*—*Sturges v. Vanderbilt*, 73 N. Y. 384; *Thornton v. Marginal Ry.* 123 Mass. 32.

Page 410, at the end of line 28, *add*—

The rule is of quite a general application. In the United States, it has often been held that when a Court has no jurisdiction of the subject-matter in a suit, neither an appearance and consent by the parties, nor pleading to the merits and going to trial will give jurisdiction to it.

4a Fields v. Walker, 23 Ala. 155.

Jacks v. Moore, 31 Ark. 31.

Smith v. Myers, 109 Ind. 1.

Dadson v. Scroggs, 47 Mo. 285.

Wheelock v. Lee, 74 N. Y. 46.

Page 410, footnote 2, for XII Bom. *read* XIII Bom.,

Page 412, line 29, *after* "personal jurisdiction." *read*—

Mr. Zug in his article on Jurisdiction broadly says:^{21a} "Jurisdiction *in personam* may be acquired, or restored if lost, by the consent of the parties. When the Court has jurisdiction of the subject-matter of an action, consent can give jurisdiction of the person."^{21b}

21a XII Encyc. Law.

21b Whyte v. Gibbs, 20 How. 541.

Grimmett v. Aiken, 48 Ark. 151.

McCormick v. Pa. Gen. R., 40 N. Y. 303.

Kenney v. Greer, 13 Ill. 4.

Smith v. Curtis, 7 Cal. 4.

Central Bank of Georgia v. Gibson, 11 Ga. 453.

Page 414, in lieu of lines 3-7 from in New York to waived. *read*—

Where an interested judge tried a case on the merits without any objection from the parties who had knowledge of the interest, the New Hampshire Supreme Court held that the objection as to his interest must be considered as waived.³¹ In New York and some other States, even in such circumstances the objection is considered as not void, and the judgment to be void. In *Oakley v. Aspinwall*,^{31a} the Court of Appeals said: "It is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the State, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind. The party who desired it might be permitted to take the hazard of a biased decision, if he alone were to suffer for his folly; but the State cannot endure the scandal and reproach which would be visited upon its judiciary in consequence." This view was approved in *Estate of White*,^{31b} and in *New case v. Light*.^{31c} Mr. Robbins in his article on Judge says:^{31d} "Where the Statute prohibits disqualified judges from acting, consent of the parties cannot be suffered to remove or waive the disqualification. This is on high grounds of public policy. On the other hand some Statutes contain consent clauses permitting parties to waive the objection. And even without such provision, if the statute does not have the force of a prohibition, the common law rule would apply which distinguishes between acts void in themselves and those which are voidable." It appears to be generally agreed upon that jurisdiction cannot be given by consent to an individual who is not a judge.^{31e} The consent required for waiver cases is usually in such expressed by appearing and pleading to the merits, even general appearance without pleading being considered sufficient.^{31f} It is generally agreed upon that an appearance by mistake^{31g} or on behalf of minors will not constitute waiver of jurisdiction.^{31h}

31a 3 N. Y. 747.

31b 87 Cal. 190.

31c 44 Am. Rep. 604.

31d XII Encyc. Law, 44.

31e Bishop v. Nelson, 83 Ill. 601.

Cobb v. People, 84 Ill. 511.

Andrews v. Wheaton, 23 Conn. 112.

31f Wheelock v. Lee, 74 N. Y. 496.

Watson v. one, 87 Ill. 41.

Thornton v. Lavitt, 61 Me. 384.

Galt v. Brigham, 41 Mich. 27.

Bohn v. Berlin, 28 Mo. 313.

Shaw v. Nat. State Bank, 4 Iowa, 179.

Duncan v. Ripley, 7 Ark. 190.

Hall v. Wobley, 13 Ga. 215.

31g Charter Oak Bank v. Bond, 17 Conn. 391.

31h Bonnell v. Holt, 89 Ill. 71.

Carver v. Carver, 4 Ind. 204.

Sullivan v. Blackwell, 28 Me. 737.

Helms v. Chadbourne, 41 Wis. 30.

Page 420, Line 5, *after* 176. *read*—

As a general rule, a want of jurisdiction may be taken advantage of at any time, and a party cannot be estopped from taking an objection on that ground at any time and in any Court. As observed however,^{55a} there are numberless exceptions to the rule.

Biley v. Lowell, 117 Mass. 76.

Wilman v. Fider, 23 Conn. 172.

Coleman's appeal, 75 Pa. St. 441.

Dector v. Hartman, 74 Ind.

Mathive v. McIntosh, 40 Wis. 120.

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Page 422, after line 17, add—

Sec. 646 B. of the Civil Procedure Code itself provides that "if it appears to a District Court that a court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous; and on receiving the record and statement, the High Court may pass such order in the case as it thinks fit." In *Suresh Chunder v. Kristo Rangini*,^{60a} a Division Bench of Calcutta High Court said: "As we read the law, on a case so submitted, the High Court has full power to consider the matter of jurisdiction or to deal with the case on the merits, so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial. Unless this is the intention of the Legislature, the enactment of Sec. 646 B. seems to be without any meaning or object. Consequently Sec. 646 B. must be read with Sec. 16 of the Provincial Small Cause Courts Act so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken on appeal to the District Court. In this view of the law we are of opinion that the parties having in both the lower Courts submitted to the jurisdiction of the ordinary Courts, it is not competent to either of them on second appeal to plead the want of jurisdiction in those Courts so as to render all proceedings taken in the suit void." And this was held in a case in which the High Court further held a second appeal not to lie on the ground of the suit being cognizable by a Court of Small Causes.

60a I. L. B., XXI Cal. 240.

Page 422, line 20, for Courts read Civil Courts.

Page 423, Line 19. before It seems read—

"It seems to us that there can be no substantial reason for holding, in the one case, that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while in the other this will be presumed if the record does not show to the contrary. . . .

Page 424, Line 7, for courts read courts.

Page 424, Line 26, omit either

Page 426, Line 19, after "consideration" add—

As to the general rule, the Chief Justice observed: "All courts from which an appeal lies are inferior Courts in relation to the appellate court before which their judgment may be carried; but they are not therefore inferior courts in the technical sense of those words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The Courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded." Thus the Court of Common Pleas was held in *Slocum v. Providence Steam Co.*,^{85c} to be a court of general jurisdiction. Mr. Zug in his article on Jurisdiction says:^{85d} "The weight of authority is to the effect that the limitation of territorial jurisdiction, and liability to reverse on appeal, does not make the court one of limited jurisdiction, and this seems to be the law in England."^{85e} . . . In some States the distinction is made between courts of record and courts not of record, the former being superior, the latter inferior.^{85f} And this distinction has, to some extent at least, the support of the Supreme Court of the United States, which in 1844 (in *Grignon's Lessee v. Astor*)^{85g} said, "These principles are settled as to all courts of record, which have an original general jurisdiction over any particular subject; they are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term, because an appeal lies from their decisions." . . . It would seem from *Lery v. Moylan*^{85h} that the English Courts reject the theory that all courts of record are superior courts." In *Ex parte Kearney*,⁸⁵ⁱ McKinstry, J., said: "There is no certain test by which to determine in all cases to which class, superior or inferior, any given court belongs. It is not remarkable, therefore, that there has been some diversity in the application of the rule, as to the presumption, to particular courts. . . . The question seems to have resolved itself into one of public policy, and whether the particular court of the limited jurisdiction ought to have extended to its judgment the sanctity of the presumptions arising from the adjudications of tribunals of general common law jurisdiction."

^{85c} 10 R. I. 112.

^{85d} XII Encyc. Law, 266.

^{85e} Peacock v. Bell, 1 Saund, 73.

^{85f} Devaughn v. Devaughn, 19 Gratt. 556.

2 How. 819.

10 C B 189.

55 Cal. 212.

Page 427, Line 17, *after* judgments." *read*—

In *Wright v. Hugen*,^{90a} the Supreme Court of Vermont said: "We are aware that the decisions in New York, and probably in some other States, have required the Justice to know the facts limiting his jurisdiction at his peril. But no such rule has ever been applied to the courts of general jurisdiction, either in Westminster Hall or in this country; and the jurisdiction of justices of the peace has become so important and extensive that we incline to believe sound policy requires of us to extend the same rule of construction in favour of their jurisdiction which is done in favour of courts of general jurisdiction." Poland, C. J., in delivering the judgment of the Supreme Court in *Farr v. Ladd*^{90b} said: "The conclusive effect of a judgment as evidence rests upon the authority of the court, upon its acting within its jurisdiction, upon its preserving its decisions in proper records, and upon the policy and necessity of determining by law the end of controversy. These reasons apply to the judgment of justices of the peace as well as to any others. The argument, that as justices have no clerks or seals, and cannot authenticate records in the mode prescribed in the Act of Congress, therefore their judgments are not entitled to full faith and credit, seems to rest upon the manner in which the court is organized, and its inability to comply with a particular form of authenticating its records, rather than upon the broader and more solid ground of the authority and jurisdiction of the court, and the interest of the community that there should be an end of litigation."

^{90a} 24 Vt. 143.

| ^{90b} 37 Vt. 158.

Page 427, *after* Line 30, *read*—

Mr. Zug in his article on Jurisdiction says: ^{92a} "To affirmatively establish the jurisdiction of a Superior Court it is not necessary that the facts, evidence or circumstances conferring it should be set out in the record. And should the record disclose nothing, jurisdiction over the person as well as the subject-matter, will always be presumed, when the validity of the judgment is questioned collaterally."^{92b}

XII Encyc. Law, 271.

Brittain v. Kinnaird, 1 Br. & Bing. 4

Doe d. Bush v. Lindsey, 24 Ga. 245.

Bokers v. Chapline, 12 Iowa, 204.

Huntington v. Charlotte, 15 Vt. 46.

Pope v. Harrison, 16 Lea, 82.

Page 428, *after* line 2, *read*—The entire question was discussed at length in *Galpin v. ---*,^{93a} in which the following principles were laid down ^{93b}:—

(a) "A Superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The rule is different with respect to courts of special and limited authority; *their* jurisdiction must affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face.

The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. When the record states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than averred.

(c) The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits and over proceedings which are in accordance with the course of the common law.

Where special powers conferred upon a court of general jurisdiction are brought into action according to the course of the common law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

^{93a} 18 Wall. 350.

| ^{93b} XII Encyc. Law, 271.

Page 432, Line 2, *for* Montan *read* Montana.

footnote 86, *for* Blackmark *read* Blackmarr.

Page 434, footnote 15, *for* 30 *read* 36.

Page 436, Line 3, after "collaterally" add—

Thus the record of a suit for foreclosure of a mortgage need not show that the land on which the mortgage is foreclosed the county.^{35a}

35a *Brownfield v. Weight*, 9 Ind. 391.

1 *Markel v. Evans*, 47 Ind. 326.

Page 438, after line 13, add—

In *Williams v. Johnson*,^{37a} Clark, J., took after observing that a judgment could be impeached collaterally on unauthorized appearance of an attorney, said: "It would be strange if this were not so, since the attorney cannot by acceptance of process bring his recognized client into court—a *fortiori* he cannot by a simple entry on the docket bring in as a party one who is in fact not a client." The majority of the court differed from him, but their decision also was based on the ground that the rights of innocent third persons were involved.ⁿ

ⁿ Burwell, J., in delivering the judgment of the majority of the court said: "Parties who are about to acquire rights under the judgments of courts are not at all bound to enquire into the authority of the attorneys who profess to represent the plaintiffs or petitioners. It is said of such persons that they come into court by their attorney; it is not permitted to them to say that they did not so come of innocent third persons have intervened. . . . Being a stranger to the judgment, purchaser at the auction sale in execution) was required to ascertain was that an officer v. sale and that he was empowered to do so by a court of competent jurisdiction.^{37b} Under the circumstances that surrounded her, she acquired by her bid and the deed made pursuant thereto a good title against heirs of S. W. Williams, named in the execution, and their heirs; for, having no notice of any irregularity or fraud in the judgment under which she bought, she had only to inquire if the court from which the execution issued had jurisdiction of the parties and the subject-matter.^{37c}" Even the dissentient judgment, however, is not of much value in support of the general rule; as Clarke, J., also admitted it as true, what was held in *University v. Lassiter*^{37d} "that when counsel, who are able to respond in damages, represent parties to an action without their authority, the court may uphold the title of an innocent purchaser at a sale under a decree in the cause, because then the owner of the land is not deprived of his property without compensation;" and further distinguished that case on the ground that in it the defendant had been served with process, and being thereby fixed with notice of all orders and decrees in the cause, he was bound by it. . . . it was his own negligence that he allowed an attorney to appear for him whom he had not

37a 34 Am. St. Rep. 513.

37b *Burton v. Spiers*, 92 N. O. 503.

27c *England v. Garner*, 90 N. O. 197.

37d 83 N. O. 38.

Page 442, Line 27, after "Court" add—

Mr. Zug in his article on Jurisdiction says: ^{39a} "If the record of an inferior court shows that such jurisdictional facts were ascertained, it cannot be collaterally impeached; but the ascertainment of such jurisdictional fact cannot be inferred from the mere exercise of jurisdiction by the court." ^{39b}

39a XII Encyc. Law, 274.

39b *Joiner v. Winston*, 68 Ala. 139.

Kruse v. Wilson, 79 Ill. 233.

Little v. Sinnett, 7 Iowa, 324.

Board of Commissioners v. Markle, 46 Ind. 96.

444, footnote 72, add—

Gray v. Hawes, 8 Cal. 562; *Baker v. Chapline*, 12 Iowa, 204
Wright v. Douglass, 10 Barb. 97.

Page 445, line 10, after defendants add—

In fact, statements on the record often avoid the usual presumption as to the service of processes or rebut it. Thus in *Gray v. Larrimore*^{71a} it appeared from the record that at the time of the alleged personal service on certain defendants, they lived beyond the reach of process from that Court, and it did not appear from the record that they had appeared and defended, or were actually within the territorial limits of the Court's jurisdiction at the time service was made on them, the presumption as to the due service of the process was held not to arise. But if the record also shows that the defendants appeared and defended, it will be presumed that they were served within the territorial jurisdiction of the Court, even though that is not averred on the record.^{71b}

70a 2 Abb. (U. S.) 542.

70b *Bissell v. Briggs*, 9 Mass. 462.

Shumway v. Stillman, 15 Am. Dec. 374.

Page 451, footnote 97, at end add—

Vide to same effect—*Posthwaite v. Ghislin*, 97 Mo. 420; *Howard v. Johnson*, 69 Tex. 655.

Page 451, footnote 8, for 20 Pac. R. 842, read 11 Am. St. Rep. 820.

Page 453, footnote 16, for 566, read 503.

Page 454, line 21, for if read—

A judgment rendered by a court of competent jurisdiction in a case brought before it, however erroneously the jurisdiction may have been exercised, is one thing; and a judgment entered by a court of like jurisdiction in a case not before it, is another and a different thing. In the one case, its judgment may be erroneous, in the other it is void. If

Page 454, Line 27, *for* this, but as pointed out by Mr. Vanfleet, *re* the correctness of the case put forward by way of illustration, but Mr. Vanfleet says, that

Page 455, Line 33, *after view, read—*

It has often been held that a decree granting relief not prayed for is not liable to a collateral attack.^{26a}

26a *McCrillis v. Harrison Co.*, 63 Iowa, 592.

| *Chase v. Christianson*, 41 Cal. 253.

Page 461, Line 18, at end of section, *add—*

In the United States also, it has been held in several cases, that the judgment of a court of Common Pleas on appeal from a Justice of the Peace for a sum in excess of the Justices' jurisdiction is not void or impeachable collaterally.^{64a} In *Randolph Co. v. Ralls*,^{64b} it was further held that although the judgment of a court not having jurisdiction of the subject-matter was void, yet if on appeal from such court to a court having original jurisdiction of the subject-matter, the parties should consent to a trial, the judgment of the Appellate Court would be binding. The general rule there also is that mere consent cannot confer jurisdiction on any court to take cognizance of an appeal^{64c}. And a court having only appellate jurisdiction cannot have jurisdiction over any suit, unless there is some judgment passed in the Original Court, and where the parties agreed that the jury in the lower Court should render a verdict for plaintiff, but that judgment should be entered only in favor of him whom the Appellate Court should decide to be entitled to it; this would not give jurisdiction to the Appellate Court to give judgment in the case.^{64d} The contrary has been held where the Appellate Court had original jurisdiction over the subject-matter of the suit.^{64e} Some courts further hold that an agreement not to appeal divests the appellate court of its jurisdiction,^{64f} the weight of authority however, is clearly against that view^{64g}.

64a *Moore v. Martin*, 38 Cal. 428.

Hinds v. Willis, 13 S. & R. 238.

64b 18 Ill. 29.

64c *Mathie v. McIntosh*, 40 Wis. 120.

Little v. Fitts, 33 Ala. 343.

Smith v. Brown, 136 Mass. 416.

Tippack v. Briant, 68 Mo. 580.

Fleischman v. Walker, 91 Ill. 312.

Merrill v. Petty, 16 Wall. 338.

64e *Annes v. Boland*, 1 Minn. 365.

Ginn v. Rogers, 4 Gill. 181.

Dicks v. Hatch, 10 Iowa, 380.

64d *Danforth v. Thompson*, 34 Iowa, 248.

64f *Townsend v. Masterson S. D. Co.*, 15 N. Y.

Watson v. Wetter, 91 Pa. St. 385.

Hostetter's appeal, 92 Pa. St. 132.

Fabs v. Darling, 82 Ill. 142.

Muldrow v. Norris, 2 Cal. 74.

Page 461, line 39, *after McVeigh,*

admitted the correctness as a general proposition, of the doctrine that "when a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed," but observed that, "like all general propositions, (it) is subject to many qualifications in its application . . . The doctrine is only correct when the Court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it." He further

Page 465, footnote 83, *for* 44 *read* 444.

Page 467, Top Heading for SERVICE OR PROCESS *read—PROCESS OR ITS SERVICE.*

Page 473, line 3, *for* Mr. Hawes says, *read—*

The same view is taken by the Courts in the United States. It has often been held that where a court has jurisdiction of the subject-matter, and certain conditions are made essential to its exercise, they may be waived by consent, and such consent may be inferred from a failure to object^{37a}.

37a *Richardson v. White*, 19 Ark. 241.
Field v. Dortch, 34 Ga. 399.

| *Cleveland v. Welsh*, 4 Mass. 491.

Page 473, line 7, *for* consent. It may *read—*consent,^{37b} It may also

37b *Taylor v. Atlantic R. Co.*, 66 Mo. 397.

| *Gager v. Doe*, 29 Ala. 341.

Page 473, footnote 38, *for* Haw. Jur. 17 *read—Hills v. Miles*, 13 Wis. 625.

Page 474, Line 8, *after the case, read—*

In *Harvey v. Tyler*,^{45a} Mr. Justice I delivering the judgment of the United States Supreme Court said: "Whenever it appears that a Court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error, or set aside by some direct proceeding for that purpose."

45a 2 Wall. 325.

Page 474, line 12, *before* the New *read*—Eastman J., in delivering the judgment of

Page 475, line 36, *for* *was read* was

Page 476, footnote 58, *for* 19 A. M. *read* 19 Am.

Page 476, footnote 59, *for* Pursly *read* Pursley.

Page 478, Line 17, *after* law. *add*—

It has even been held that where a law authorizes or contemplates the doing of an act by a Court, the Court must do it in term time, unless the power to do it in vacation is expressly conferred by law,^{64a} or unless a trial is in progress at the time of the usual end of the term, in which case the term is deemed to extend to the close of the trial.^{64b}

64a Newman v. Hammond, 46 Ind. 119.

State v. Judge, 21 Ia. Ann. 733.

64b Walker v. State, 102 Ind. 502.

St. Carrol v. Commonwealth, 84 Pa. St. 107.
Johnson v. Pacific Cement Co., 60 Cal. 648.

Page 478, footnote 64, at the end *add*—*Garlick v. Dunn*, 42 Ala. 401.

Page 479, footnote 70, *for* 14 All. *add* 14 Allen.

Page 482, line 20, *after* void" *add*—

In *Voorhees v. Jackson*,^{95a} the United States Supreme Court said: "The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in an action concerning the matters adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper."

95a 10 Pet. 474.

Page 483, footnote 10, *for* Moore *read* Moore

Page 486, footnote 40, *at the end add*—

Otterson v. Middleton, 102 Pa. St. 78. *Murchison v. White*, 54 Tex. 78. *Mussey v. White*, 58 Vt. 45.

Page 488, footnote 47, *for* 162 *read* 153.

Page 511, footnote 48, *for* Ty, *read* Tay.

Page 512, line 50, *after* England." *add*—

Speaking of the binding effect of such decisions, Swift, J., in *Brown v. Union Insurance Co.*,^{65a} said that they must be conclusive, so far as the law of nations is recognized. "for the same reason that judgments of Courts proceeding according to municipal law are conclusive, as far as that law extends."

Page 513, Top Heading, *for* PROCEEDINGS *read*—JUDGMENTS.

65a 4 Am. Dec. 204.

Page 515, line 32, *after* "taken." *read*—There, also, the admission of a will to probate has been held to be conclusive evidence in a collateral proceeding that the will had been duly proved.^{65a}

65a Caulfield v. Sullivan, 85 N. Y. 153.
Levett v. Mathews, 24 Pa. St. 330

State v. Mc Ginn, 20 Cal. 273.

Page 516, line 1, *for* it. *read* it, though the contrary also has sometimes been held.^{66a}

66a Ives v. Salisbury, 56 Vt. 565.

Page 516, line 22, *after* appealed. *add*—

In the United States, the courts have sometimes gone beyond the rule, and held that the grant of probate or letters of administration is a conclusive finding as to the residence and the existence of assets within the jurisdiction of the court,^{71a} as well as to the value of the entire estate,^{71b} which may not be collaterally impeached.

71a Holmes v. Oregon and Cal. R. Co., 7 Sawy. 380.
Thomas v. Marrisett, 76 Ga. 904
Irwin v. Scriber, 18 Cal. 507.

Dequindre v. Williams, 31 Ind. 444.
Rollins v. Henry, 84 N. Car. 569.
71b Lucas v. Told, 28 Cal. 182.

It has often been held that jurisdiction is determined by the presence of the property in the jurisdiction.^{71a} In *Croudsom v. Leonard*,^{71b} the United States Supreme Court said: "Where the subject-matter of the suit, the *res* is within the territorial dominion of the sovereign power under the authority of which the Court acts, it is within the jurisdiction of such court." Mr. Flint in his article on *res judicata* says:^{71c} "The property to which the action relates must actually be within the limits of the jurisdiction of the court passing upon it." In *Douglass v. Phenix Ins. Co.*, 34 Am. St. Rep. 448, Andrews, C. J., said: "No state can subject either real or personal property out of the jurisdiction to its laws. It may, and often does, compel persons, through the process and judgment of its courts, to perform acts which affect their title and interest in and to property outside the limits of the State. Having acquired jurisdiction of the person, the courts can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction. But it is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction."^{71d} In the case of movables, their seizure under the attachment shows that their actual *situs* is within the jurisdiction. But in respect to intangible interests, debts, choses in action, bonds, notes, accounts, interests in corporate stocks, and things of a similar nature, the question whether the *res* is within the jurisdiction of the sovereignty where the process is issued, is not so readily determined. The general rule is well settled that the *situs* of debts and obligations is at the domicile of the creditor. But the attachment laws of our own and of other states recognize the right of a creditor of a non-resident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the *situs* of a debt at the domicile of the debtor.^{71e} It is at least doubtful whether this qualification of the general rule applies to negotiable instruments or other written obligations of a resident debtor, held by and in the possession of his non-resident creditor.^{71f} But no court can acquire jurisdiction in attachment-proceedings unless the *res* is either actually or constructively within the jurisdiction, and we are of opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the Insurance Company, by serving upon the agent of the Corporation there, and without having acquired jurisdiction of the plaintiff, must fail for the reason that the debtor, the Insurance Company, was in no just or legal sense a resident of Massachusetts and had no domicile there, and was not the agent of the plaintiff, and that in contemplation of law the Company and the debt were at the time of the issuing of the attachment in the State of New York, and not in the State of Massachusetts. This Court has had occasion heretofore to consider the effect of the act of a foreign corporation constituting an agent in another State, upon whom proceedings may be served, done in compliance with the laws of such State in pursuance of a condition imposed, and to enable the Corporation to do business in such State. It has been held that by such act, the Corporation does not change its domicile of origin or its residence. It becomes bound by judgments rendered upon service on the designated agent, because it has consented so to be bound, but it remains as before a resident of the State where it is incorporated.^{71g} If in this case, the Insurance Company could be regarded as residing or having its domicile in Massachusetts for the purpose of attachment proceedings, it likewise has a domicile in every State where it may have appointed an agent under similar laws, and so constructively, upon the theory upon which the Massachusetts attachment is defended, the Corporation is present as debtor to the plaintiff in every State where such agency exists, and the creditor is also present at the same time in each of such jurisdictions. The admission of such a principle would give rise to most embarrassing conflicts of jurisdiction and subject creditors of domestic corporations to great prejudice. We think the rule is that a domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and that it cannot be garnished in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over the person of such creditor.

Martin v. Darling, 78 Me. 78.
 Heidritter v. Eliz Oil-cloth Co., 112 U. S. 294.
 Risley v. Phenix Bank, 38 Am. Rep. 421.
 4 Cranch, 437.
 XXI, Encyc. Law, 277.
 Plimpton v. Bigelow, 93 N. Y. 593.

Williams v. Ingersoll, 89 N. Y. 508, 529.
 Embree v. Hanna, 5 Johns. 101.
 Osgood v. Maguire, 61 N. Y. 524.
 Gibbs v. Queen Ins. Co., 20 Am. Rep.
 Plimpton v. Bigelow, 93 N. Y. 593.

Therewith.⁷² In *Averill v. Steamer Hartford*,^{72a} it was held that the Court whose mesne or final process made the first actual seizure of the thing must have exclusive power over its disposal and the distribution of the fund arising therefrom; and the judgments of all other Courts, when filed in the Court having the custody of the fund, must be regarded as complete adjudications of the subject-matter of litigation and be entitled to distribution accordingly.

^{72a} 2 Cal. 308.

Page 523, Line 27, *after* jurisdiction." *add*—

Mr. Flint in his article on *Res Judicata* says^{9a} :
"If it is thus subject to the jurisdiction at the time suit is brought, its subsequent removal without the jurisdiction will not interfere with the progress of the case."

^{9a} XXI Encyc. Law, 277.

Page 527, Footnote 30, *for* Steuart *read* Stewart

Page 537, Line 17, *for* are considered foreign, if *read*—which are

Page 540, Footnote 16, *for* Ad. *read* 16 Ad.

Page 543, Line 9, *after* application. *add*—

The essential characteristic of comity was mutuality or universal reciprocity, and yet on account of the different views taken in different States, no general basis for that mutuality or reciprocity could be arrived at.

Page 544, Line 40, *after* foreign judgment." *add*—

In *Glass v. Blackwell*^{43a} the Arkansas Supreme Court said:—A judgment, "whether foreign or domestic, raises a binding obligation to pay the sum awarded by it."

^{43a} 48 Ark. 50.

Page 546, *omit* Footnote 55.

Page 548, Line 19, *after* also." *add*—

Mr. Kerr in his article on Conflict of Laws says,^{61a}
"that the distinction is regarded as having a just foundation in international justice."

^{61a} III Encyc. Law, 530.

Page 554, Footnote 83, *for* Stephens *read* Stevens

Page 554, Footnote 83, *for* 266. *read* 256

Page 554, Footnote 83, *for* Bank *read*—

Eastern Townships Bank

Page 555, Line 31, *for* Biequet *read* Beequet.

Page 556, Line 14, *after* "in question." *read*—

Mr. Kerr in his article on Conflict of Laws says : ^{91b} "In order that a judgment may be valid and entitled to the recognition of foreign tribunals, it is indispensable that the Court pronouncing the judgment should have a lawful jurisdiction over the case, over the subject of the action, and over the parties to the action : and if the jurisdiction fails in either of these respects, the judgment will be a nullity, without obligation, and not entitled to be respected or enforced beyond the jurisdiction of the Court rendering it, whether the judgment be *in rem* or *in personam*."

^{91b} II Encyc. Law, 527.

Page 558, Footnote 100, *for* 275. *read* 272

Page 562, Line 9, *after* international law. *add*—

In *Douglass v. Phenix Ins. Co.*,^{7a} Andrews, C.J., said : "The legal proceedings or judgments of another state are recognized here only where jurisdiction has been acquired in the foreign forum. But it is only jurisdiction in an international sense or according to the course of common law, and judicial proceedings which conform to, or rather, which are not taken in disregard of the principles and rules of general jurisprudence, which this state is bound to recognize, and if the laws of Massachusetts go to the extent claimed, and assume to authorize attachment proceedings to seize a credit owing to the resident of this State, when neither the debtor nor creditor are within the jurisdiction, this State is not, we think, bound to recognise them."

^{7a} 34 Am. St. Rep. 448

Page 563, Line 8, *after* admitted. *add*—

"Mr. Flint in his article on *Res Judicata* says^{9a},"
"The rule of the civil law, as given by the German Jurist Bar, is substantially the same as the rule prevailing in *England* and the *United States*, and is thus stated : Judgments are binding—First. When rendered by the Courts of the State in which the defendant is domiciled, in all suits *in personam* and in all possessory actions which concern movables and of which the former *rei sitæ* has not jurisdiction. Second. When rendered by the Courts of a State by whose laws a contract is to be adjudicated in those cases in which the debtor personally resides in such State, or has in it property not merely illusory, provided that, in such cases, the judgment is based on the contract, whether for its execution or its rescission. Third. When rendered by the courts of a State in which a tort or delict has been committed in a suit for damages against the wrong-doer, provided such damages are compensatory and not vindictive. Fourth. When rendered by the courts of a State in which are situated either goods or claims, when such goods or claims are attached, the judgment in such case being effective up to the value of such goods or claims, when it is entered on the cause of action for which the attachment is laid, the Court having jurisdiction of the action. Fifth. When rendered by the courts of a State in all proceedings *in rem* as to things situate in such State, whether movable or immovable, provided such things have a continuous abiding place."

^{9a} XXI Encyc. Law, 281.

Page 573, Line 22, *for* may read many

Page 578, line 11, at the end of line *add*—

In *Wood v. Watkinson*^{64a}, the Connecticut Supreme Court said: "No greater effect is to be given to it (the judgment) than it would have in the State where it was rendered. It has no higher dignity in any other state than in the one where it was pronounced; and hence if, in the course of the State where the judgment was rendered, it is inconclusive, or if it is inquirable into there during a particular period or on certain conditions, it will be open to investigation, to the same extent, everywhere else. So if a judgment operates in the State where it was rendered only *in rem*, it will not elsewhere be enforced as *in personam*. It results conclusively from this principle, or is rather involved in it, that if a judgment, in the State where it is recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to it in any other State, where it is endeavoured to be enforced. It derives its obligation only from the laws of the State in which it is pronounced."

64a 44 Am. Dec. 562.

• Page 580 Top Heading, *for* FOREIGN read—

OF JUDGMENTS OF FOREIGN

Page 590, Line 14, *after* "natural justice." *add*—

In *Dunstan v. Higgins*^{18a} O'Brien, J., in delivering the judgment of the New York Supreme Court said: "It is the settled law of this state that a foreign judgment is conclusive upon the merits. It can be impeached only by proof that the court in which it was rendered had not jurisdiction of the subject-matter of the action or of the person of the defendant, or that it was procured by means of fraud^{18b} . . . effect is given to the judgments of the courts of foreign countries by the comity of nations which is part of our Municipal law. The refusal of the foreign court to allow a commission to examine witnesses here does not affect the conclusive character of the judgment. Such applications are generally within the discretion of the court to which they are addressed and then a refusal to grant them does not constitute even a legal error subject to review. But even if it appeared in this case, as it does not, that some legal right of the defendant was denied in refusing the application, that would not affect the validity or conclusive nature of the judgment, so long as it stood unreversed and not set aside. Legal errors committed upon the trial or during the progress of the cause may be corrected by appeal or motion to the proper court, but they furnish no defence to an action upon the judgment itself. Where a party is sued in a foreign country, upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purpose of his defence, if he has any, and any error committed must be reviewed or corrected in the usual way. So long as he has the benefit of such rules and regulations as have been adopted or are in use for the ordinary administration of justice among the citizens or subjects of the country he cannot complain, and justice is not denied to him. The presumption is that the rights and liability of the defendant have been determined according to the law and procedure of the country where the judgment was rendered, and there is nothing in the record to the contrary."

18a 34 Am. St. Rep. 431.

18b *Lazier v. Westcott*, 82 Am. Dec. 404.

Page 610, Line 20, *after in rem.* *add*—

Similarly in *Cheriot v. Fournsat*,^{87a} the Pennsylvania Supreme Court said: "The jurisdiction of a foreign court may be examined, not only as to the authority under which it is erected, but as to the subject over which it is exercised; but if the Court is duly constituted, and has jurisdiction over the subject, its decrees *in rem* cannot be revised by the Court of another nation. The decree of a foreign prize tribunal of general jurisdiction, condemning property for having been concerned in the violation of law, is conclusive upon the point that the seizure of the property was made in conformity with the law, it being a matter within their jurisdiction to decide."

87a 3 Binn. 220.

Page 614, Line 33, *after* grievances. read—

The Michigan Supreme Court said the same in *Dutton v. Shaw*.^{8a}

8a 35 Mich 431.

Page 616, Line 28, at the end of the para. *add*.—

In *Pittapur Raja v. Surya* Sir Barnes Peacock in delivering their Lordships' Judgment observed that "that section does not say that every suit shall include every cause of action, or every claim which the party has, but, every suit shall include the whole of the claim arising out of the cause of action—meaning the cause of action for which the suit is brought."

16a L. R. XII. 1. A. 119.

617, footnote 1 *for* Haran Chander, XIV. B. L. *read* Rajkoomar Das, XIV
R

Page 618, footnote 28, *add*—*Udmi v. Raji*, 1894 P. R., No. 23.

Page 622, line 15, at end of para, *add*—

In the United States in
Roosevelt, J., in delivering the judgment of the New York Supreme Court said: "Where joint-debtors reside in different States they may be sued separately in the respective States having jurisdiction of their respective persons or property, and a judgment in such case against one in one state is no bar to a recovery against the others in another state." A similar view has been taken in other cases also.^{44b}

44a 29 Barb. 549.

44b *Mink v. Shaffer*, 124 Pa. St. 280.
Morris v. Hand, 70 Tex. 481.
Hart v. Sansom, 110 U. S. 151.
Hanley v. Donoghue, 43 Am. Rep. 574.
Taylor v. Kilgore, 33 Ala. 214.

Bailey v. Martin, 119 Ind. 103.
Short v. Galway, 83 Ky. 501.
Cook v. Brown, 28 Am. Rep. 259.
Richards v. Barlow, 140 Mass. 218.
Jackson v. Colver, 1 Wond. 498.
Farrington v. Payne, 15 Johns. 431.

Page 629, footnote, *for* Simos *read* Simes

Page 630. line 18, at the end of para. *add*—

In *Goodrich v. Yale*,^{75a} the tort complained of in the first action was that on divers days the defendant entered upon the real estate of the plaintiff without right, and caused the water to flow down and waste their reservoir, and at times to flood their mill, and then, by shutting the gate, took away the water from their mill. The acts causing the damages were stated as a series of connected acts occurring while the defendant was a trespasser by entering without right upon the plaintiff's estate, and the answers of the defendant so treated the same, denying the allegation as to the wrongful entrance upon the plaintiff's land and denying all the acts alleged as wrongs connected with the trespass. Upon issues thus joined, the assessors were asked to assess the damages occasioned by the raising of the gate in the reservoir dam, and judgment was entered for the damages assessed; and the decision was held to bar a subsequent suit for damages for shutting down the plaintiff's gate on the ground of the identity of cause of action. Dewey, J., in delivering the judgment of the Massachusetts Supreme Court said: "The particular acts causing the damage to the mill are not set forth as connected with a separate entry, but as a series of acts, all of which are combined as causing the injury to the mill. It is true that the declaration does not restrict them to the proof of a single entry; but it does connect all these acts with each and every entry. It fails to state them as separate causes of action, or to allege them to have occurred at different times."

75a. 8 Allen, 454

Page 630. Footnote 74, at the end *add*—

De La Gu

s Co. v. Howell, 92 Ill. 19.

Page 632. Line. 33, *after* California *read* Supreme

Page 32, Footnote 81. *for* 12 A. M. *read* 12 Am

Page 633, Footnote 84. *for* Branenburgh *read* Brannenburgh

Page 645. Line 39, at the end of line *add*—

The principle of this decision has been followed by their Lordships in *Mahomed Riasat Ali v. Husin Bannu*,^{30a} in which a decree in favor of a Mahomedan lady for her dower against the brother of her deceased husband has been held not to bar a suit by her for a declaration of her right to a life estate in all the property of the said husband: Sir R. Couch observing that "it cannot be said that the claim of the plaintiff as heir of her husband to the whole of his property was a portion of her claim to dower. The causes of action in the dower suit and in the present suit are distinct."

I. L. R., XXI Cal., 157

Page 650. Line 6. *for* indivisible *read* indivisible^{11a}

Page 651, line 1, *after* the latter. *add*—

In *Phillips v. Berick*,^{45a} Spencer, J., in delivering the judgment of the Supreme Court of New York, said: "If the plaintiff is not bound to unite in one suit distinct causes of action, and if he has a right to elect to proceed by separate suits, and obtain judgment on one of his causes of action, upon what principle is it that he shall lose his deferred cause of action merely because it resembles the one on which he has obtained judgment. The law is not so inconsistent in its provisions, nor indeed so unjust, as to deny to the party the means and the right of showing that, although there is a resemblance between the causes of action, and they belong to the same family, yet that there is not an identity, but that in truth they are distinct and different."

8 Am. Dec. 29

Page 651, footnote 45, at the end *add*:—*Vide* to same effect. *Millard v. Missouri, R. Co.*, 86 N. Y. 441. *Sloman v. Great, W. Ry. Co.*, 67 N. Y. 208.

Page 661, Top Heading *for* **CONTRACT** *read*—**COVENANTS**

Page 664, Top Heading *for* **BREACH OF ACTION** *read*—

BREACH OF CONTRACT

Page 674, line 9, *after* unnecessary suits." *add*—

The avoiding of vexation to the defendant is only an effect of the rule, which is however neither based on it nor circumscribed by it. The contrary view was taken in *Wales v. Jones*,^{1a} in which the Michigan Supreme Court said: "On principle, it seems that this plea can never prevail, except in cases where the latter suit is vexatious. Hence, where it appears that the first action must have been ineffectual, the Courts of Connecticut have often determined that its pendency shall not abate the second, because in such case the latter is not vexatious. This appears to be the sound and reasonable doctrine upon the subject, and will perhaps reconcile the apparent diversity of decisions in the Courts of the different States and in England. When the plaintiff at the same time commences two suits in the same form, for the same cause of action, and causes the defendant to be arrested and held to bail in both, or his goods to be attached in both, it is at once apparent that his conduct is vexatious and oppressive, and a palpable abuse of process of the Court, and justice forbids that he should derive any benefit from either of his suits. But where the record shows apparent good faith in the commencement of the second suit, and that the first was discontinued before the defendant is called upon to plead in the second, so that he is not unnecessarily harassed by the defence of the two suits for the same cause at the same time, the second suit cannot be deemed vexatious, and cannot therefore be abated by the pendency of the prior suit when it was commenced. On the contrary, to hold the second suit abatable for that cause, would be to make the law favor, rather than abhor, a multiplicity of suits, inasmuch as it would render another action necessary, when the plaintiff's claim was a meritorious one."

The weight of authority, however, is against that view, and in *Gramsby v. Ray*,^{1b} in which the New Hampshire Supreme Court said that the pendency of two suits brought by one plaintiff against one defendant, for one cause at the same time, would be a sufficient cause for abating the second suit, without inquiry into the fact of actual vexatiousness and oppression.

^{1a} 1 Mich. 253.

^{1b} 52 N. H. 513.

Page 676, line 26, at the end of section. *add*—

There it is held to be a leading general principle as to the Courts of concurrent or co-ordinate jurisdiction only that whichever of those having jurisdiction first acquires possession of a cause will retain it throughout.^{7a} The only requirement here, in that respect, is that the former suit be instituted and pending in a Court having jurisdiction. And, as in the United States, if the Court having jurisdiction of that suit, because of its limited jurisdiction or mode of proceeding, is not capable of determining the whole controversy, another Court may take jurisdiction and accomplish it.^{7b} The fact that the Court has authority to try and determine actions of that character or class is sufficient to cause the abatement, notwithstanding the existence of a question as to whether such Court has acquired jurisdiction of the parties or not, or of the particular case until there is a decision that it has not jurisdiction.^{7c} The rule is further restricted to such questions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to matters which may by possibility become involved in it.^{7d}

^{7a} *Ober v. Gallagher*, 93 U. S. 100.
Harleman v. Battershy, 53 Ga. 36.
Mall v. Maxwell, 107 Ill. 554.
Miller v. County Commrs., 119 Mass.
Gould v. Hayes, 19 Ala. 438.

Uhlfelder v. Levy, 9 Cal. 607.
Merriam v. Baker, 9 Minn. 40.
Buck v. Colbath, 3 Wall. 334.
Putnam v. New Albany, 4 Biss. 365.

Page 677, line 29, *after* jurisdiction, *add*—

Mr. Rockel, in explaining the rule, says :^{11a}
“The fact that another action has been subsequently commenced, although between the same parties and for the same cause, is not a ground for abatement^{11b}. When two suits are commenced at the same time, each one abates the other.^{11c} A second action will not be abated on the ground that a previous action has been brought for the same cause, where the first suit has been dismissed before the plea to the second was filed.^{11d} But the fact that the first suit is dismissed after the plea of abatement has been interposed, will not prevent the abatement of the second suit, the first having been pending when the second was commenced.^{11e} To maintain the defence of the pendency of another suit for the same cause of action, it must be affirmatively proved that the suit is still pending.”^{11f} To avoid the application of the rule, the plaintiff may show that it was commenced on a subsequent day and not on the same date as apparent from the record.^{11g} When there is an appeal from a decision in a suit, the suit is deemed to be pending during the pendency of the appeal.^{11h}

^{11a} VIII Encyc. Law, 550.

^{11b} Webster v. Randall, 10 Pick. 13.

Wood v. Lake, 13 Wis. 84.

Nicholl v. Mason, 21 Wend. 330.

Beach v. Norton, 8 Conn. 71.

Davis v. Dunklee, 9 N. H. 545.

Haight v. Hulsey, 3 Wend. 258.

Morton v. Webb, 7 Vt. 124.

Wales v. Jones, 1 Mich. 253.

Adams v. Gardner, 13 B. Mon. 107.

Rogers v. Hoskins, 15 Ga. 270.

Clifford v. Cony, 1 Mass. 495.

Toland v. Tichenor, 3 Rawl. 326.

Harris v. Johnson, 65 N. Car. 478.

Leavitt v. Mowe, 54 Md. 613.

^{11c} Frog v. Long, 3 Dana, 151.

Parker v. Coleord, 2 N. H. 36.

Hope v. Alley, 11 Tex. 259.

^{11f} Phelps v. Winona, 35 N. W. R. 273.

Craig v. Smith, 15 Pac. R. 337.

^{11g} Davis v. Dunklee, 9 N. H. 545.

^{11h} Gregory v. Gregory, 33 N. Y. Sup. Ct., 1.

Boswell v. Tunnell, 10 Ala. 958.

Page 678, line 24, *after* whole relief, *add*—

The rule is also held not to apply where it appears that the first suit must be ineffectual,^{16a} or where the former suit is so defective that no judgment could be properly rendered therein^{16b}, or is a mere nullity.^{16c}

^{16a} Quinmebang Bank v. Tarbox, 20 Conn. 510.

^{16b} Reynolds v. Harris, 9 Cal. 338.

Durand v. Carrington, 1 Root. 353.

^{16c} Phillips v. Quirk, 48 Ill. 324.

Page 678, line 28, *for* former suit. *read*—former suit.^{16d}

^{16d} Vide Crane v. Larsen, 15 Pac. R. 326.

Page 678, line 34, *after* that claim, *read*—

In a suit against one obligor, pendency of a prior suit against all the obligors, is a good plea in abatement.^{17a}

^{17a} Graves v. Dale, 1 T. B. Mon. 191.

Page 678, line 36, *after* first, *read*—

Thus the plea of pendency of a former suit cannot be sustained, where, in the one case the action is against the firm on their joint endorsement, and in the other against a member, on a several liability, involving the firm in no liability.^{17b}

^{17b} Blackburn v. Watson, 85 Pa. St. 241.

Page 679, line 20, *after* the same, *add*—

In *Schenck v. Schenck*,^{20a} it was held to be a good plea in abatement of an action of *assumpsit*, that the defendant had previously commenced a suit against the plaintiff, in which the matters alleged in the plaintiff's declaration might be set off. In *Osborn v. Cloud*,^{20b} it was held, however, that the pendency of a suit in which the parties to the one at bar were defendants, and in which the plaintiff in the suit at bar might, by cross-petition, obtain the relief sought in his suit, was not a ground for abatement of the latter suit.

^{20a} 10 N. J. Law. 276.

^{20b} 23 Iowa, 104.

Page 682, line 17, *after* States, *add*—

In *Douglas v. Phenix Ins. Co.*,^{32a} Andrews, C.J., in delivering the judgment of the New York Supreme Court said: “The pendency of an action in another State, between the same parties and for the same cause, does not, according to the general rule, abate the second suit. An exception to this general doctrine was made in this State in the early case of *Embree v. Hanna*^{32b} in respect to prior attachment proceedings instituted in the State of Maryland under the laws of that State against a debtor of a New York creditor, by a creditor of the latter. The New York creditor subsequently commenced an action in this State against his Maryland debtor, to recover the debt, and the defendant pleaded in abatement the pendency of the attachment-proceedings in Maryland, and the plea was held to be good, on the ground that the debtor might otherwise be compelled to pay the debt twice.”

^{32a} 34 Am. St. Rep. 448.

^{32b} 5 Johns. 101.

Page 682, footnote 31, at the end *add*—
20 Ind. 528. Williams v. Ayrault, 31 Barb. 364. Eaton v. Hunt, 20 Ind. 457. Bradley v. Bank.

Page 682, footnote 32, at the beginning *add* :—
Smith v. Lathrop, 44 Pa. St. 326. Hatch v. Spofford, 22 Conn. 485.
Oncida County Bank v. Bouncey, 101 N. Y. 173.

Pages 685, line 19, *for* suit ; *read*—suit.^{45a}
^{45a} Carter v. Mills, 30 Mo. 437. | Edwards v. Norton, 55 Tex. 405.
Smith v. Hodson, 78 Me. 180. | Galbreath v. Estes, 38 Ark. 590.

Page 685, line 22, *for* they claim, *read*—
grantors could not.^{45b} They claim : they can make no defence which their

Horn v. Jones, 28 Cal.

Pages 685, 686, 687, Top Heading *after* PENDENTE *read*—LITTE.

Page 687, line 3, *for* his grantor, *read*—his grantor.^{53a}
^{53a} Poston v. Eubank, 3 J. J. Marsh. 43. | Bunsen v. Eilers, 11 Wis. 277.
Clarke v. Kochler, 32 Tex. 679.

Page 687, line 6 *for* assignor, *read*—assignor.^{53b}
^{53b} Krebman v. Cordell, 68 Ill. 24.

Page 687, footnote 55, *for* Ben. Lis. Pend. 275, *read*—
14 ; Cleveland v. Barrum, 24 N. Y. 613 : Yeatman v. Sa N.
Young v. Cardwell, 6 Lea, 171.

Page 688, line 2, *after* Thus in
becoming such by operation of law, may be compelled by the other party to become a
party to the pending suit. Anderson v. Wilson ^{56a} it was held that an assignee.
^{56a} 100 Ind. 408.

Page 688, footnote 57, *for* 199 *add* 109

Page 690, line 10, *after* rule itself, *add*—
language says : ^{66a} "Some cases seem to imply that one of the primary objects of *lis*
is notice. Some authors arrange the cases under that head. This is an erroneous
view. While Courts will endeavour to so apply the doctrine of *lis pendens* as to save, if
possible, the rights of innocent parties, that can only be a secondary object, and must yield
to the paramount one of holding within the jurisdiction of the Courts the subject-
matter of litigation so as finally to enable them to pronounce judgment upon it."

^{66a} XIII. Encyc. Law, 870.

Page 690, line 21, *after* Ballou, *read*—
lis pendens was founded upon necessity and not upon notice, and The New York Supreme Court held that the rule of

Page 694, footnote 92, at the end, *add*—
Chapman, 14 Am. Dec. 766. Murray v. Ballou, 1 John, Ch. 566. Newman v.

Page 696, *after* line 26 *add*—
disposed of on the merits. Thus in Newman v. Chapman, ^{3a} it was held that if the suit
were discontinued—dismissed for want of prosecution or for any other cause not upon the
merits, or is abated—the *lis pendens* of that suit comes to an end, and should a new suit be
commenced, the parties to the former suit and those holding under them would not be
affected by the *lis pendens* of the former suit.

^{3a} 14 Am. Dec. 766.

Page 700, Top Heading, *for* DURING THE PENDENCY, *read*—TILL THE DECISION

Marginal note, *for* during the pendency *read*—
till the decision

Page 702, line 31, *after* Council, *read*—
a new suit, and not merely a continuation of the suit, the judgment in which it is brought
reverse, and considered it to be well settled that a writ of error

Page 706, after line 7. read—

In *Watson v. Wilson*, ^{50a} the Court said, as to the negligence objected in the case, we are not prepared to say, nor does our experience in the ordinary progress of a chancery suit in this State authorize us in saying, that from May, 1825 till 1828, when Wilson obtained his deed, there was a lapse of time which, unexplained, would of itself amount to laches, such as to deprive the complainant of the benefit of the sale. In *Gossam v. Donaldson*, ^{50b} the Court held that a delay of three years was not negligence in prosecuting a suit and would not destroy *lis*

^{50a} 2 Dana, 406.

| ^{50b} 18 B. N.

Page 708, line 25, for suit. read—suit^{51a}.

^{58a} Wisconsin Cent. R. C. v. Wisconsin River
Co., 71 Wis. 94.

| Bradley v. Luce, 99 Ill. 234.

Page 715, line 11, for party read—party^{92a}.

^{92a} Hunt v. Haven, 52 N. H. 162.
Arnold v. Smith, 80 Ind. 422.

| Davis v. Ranklin, 50 Tex. 279.
Scurlett v. Gorham, 28 Ill. 319.

Page 715, line 33, after purchasers. add—

It is on this very account that it is considered necessary for the application of the rule of *lis pendens* that the owner of the *res* should be a party, because if he is not impleaded, he is at liberty to dispose of the *res* and the purchaser will take it unaffected by the suit, although it may be pending against parties other than the real owners.^{95a} ^{95b} And the owner should have been a party at the time of the alienation or the grant, as the alienee will not be bound if the owner becomes a party to the suit subsequently to the grant.^{95c}

Sprague v. White, 35 N. W. R. 751.
Shaw v. Padley, 64 Mo. 519.
Canal Bank v. Hudson, 111 U. S. 66.
Carroll Co. v. Smith, 111 U. S. 556.
Alwood v. Mansfield, 59 Ill. 508.
Bennett v. Hotchkiss, 20 Minn. 108.

| Bailey v. McGregor, 46 Iowa, 667.
^{95b} XIII Encyc. Law, 882.
^{95c} Arnold v. Smith, 80 Ind. 417.
Marchbanks v. Banks, 44 Ark. 48.
Farmer's National Bank v. Fletcher, 44 Iowa, 253.

Page 718, line 16, after negotiable paper.

In *Winston v. Westfeldt*, ^{11a} Goldthwaite, J., said: "Negotiable paper representing as it does in almost all civilized nations a very large proportion of the commercial operations, and serving to a great extent as the representative of money, is justly a favorite of the law, and enjoys immunities and privileges which are extended to no other species of contract. The tendency of the Courts has been to uphold this description in the hands of the *bonâ fide* holder against every species of defence which might exist as between the original parties. The credit and confidence due to it must be impaired if the buyer was required to examine the Court of every county in the State before he could be sure of his purchase: and such would necessarily be the case if the doctrine of *lis pendens* were applied to it. There are no adjudications to force us to this extremity, the strongest considerations of public policy seem to forbid the extension of the rule to money or bank-bills, and we think that commercial paper, as the representative of money, should stand on the same footing in this respect."

^{11a} 58 Am. Dec. 278.

Page 718, line 39, for Pennsylvania. read—Pennsylvania.^{9a}

^{9a} Diamond v. Lawrence Co., 37 Pa. St. 353.

| Day v. Zimmerman, 68 Pa. St. 72.

Page 719, footnote 25, for Barb. read—N. Y.

Page 720, footnote 28, for Fensier, read—Fensier.

Page 720, at the end add—

v. Cornwall, 51 Cal. 482.

Page 730, line 5, after the courts. add—

In *Center v. Planters' Bank*, ^{61a} it was held that the description would not be sufficient, unless it was contained in the pleadings, or in exhibits which were by proper averment made part of them; and so evidence recorded in the case after its commencement, could not be considered in connection with the question of *lis*

^{61a} 22 Ala. 743.

INDEX.

	PAGE.
ACTION —Identity of form of —not required for <i>res judicata</i> ...	50
<i>See Cause of action.</i>	
ACTS —VIII of 1859 (Civil Procedure Code)—	
S. 2	7, 9, 12, 27, 92, 95, 97, 99, 123, 762
S. 7	615, 616, 620, 644, 648, 667, 672
S. 9	626
S. 10	643, 644
S. 11	
S. 12	
S. 42	668
S. 148	123, 626
. 223 ...	
S. 246	315, 477
S. 32	
XIV of 1859—	
S. 1	
XXIII of 1861—	
S. 35	410
XIX of 1863—	
S. 8	29
X of 1865 (Indian Succession Act)—	
S. 242	508, 525
XI of 1865—	
S. 5	
XVI of 1868—	
S. 13	
S. 15	
S. 16	285, 286
VIII of 1869—	
S. 38	47
XIV of 1869 (Bombay Civil Courts Act)—	
S. 25	
VII of 1870 (Court Fees Act)—	
S. 7	
S. 9	

	PAGE.
VI of 1871 (Bengal Civil Courts Act)—	
S. 17	479, 480
S. 19	284, 285, 287
S. 20	283
S. 22	313
XXIII of 1871 (Pensions Act)—	
S. 6	112
I of 1872 (Indian Evidence Act)—	
S. 41	510, 511, 513
S. 44	
IX of 1872 (Indian Contract Act)—	
S. 43	616, 618, 619, 622, 642, 644, 649, 650, 658, 662, 663, 668, 671, 672, 673, 747, 749, 753
III of 1873 (Madras Civil Courts Act)—	
S. 12 ...	
S. 13 ...	
S. 17	
X of 1873 (Indian Oaths Act)—	
S. 9	127
S. 10	127
XIX of 1873 (N. W. P. Land Revenue Act)—	
S. 241	268
II of 1874—	
S. 63	29
X of 1876 (Bombay Revenue Jurisdiction Act)—	
... ..	274
S. 15	370
X of 1877 (Civil Procedure Code)—	
S. 12	571
S. 13	13, 14, 392, 395
S. 1	
S. 30	210, 214, 215, 217
S. 158	124
XII of 1879—	
XIII of 1879—	
S. 23	
V of 1881 (Probate & Administration Act)—	
S. 59	513, 514

	PAGE.
XII of 1881 (N. W. P. Rent Act)—	
S. 93	269, 311
S. 95	270
IV of 1882 (Transfer of Property Act)—	
S. 52	693
S. 99	673
XIV of 1882 (Civil Procedure Code)—	
S. 2	116, 119, 537, 574
S. 5	357
S. 10	372, 373
S. 11	243, 250, 253, 254, 471, 574, 624
S. 12	33, 53, 361, 571, 675, 676
S. 13	14, 15, 18, 21, 22, 23, 25, 26, 27, 30, 33, 34, 38, 55, 59, 68, 80, 83, 101, 104, 110, 117, 119, 124, 134, 145, 147, 149, 174, 179, 186, 189, 391, 394, 395, 491, 568, 575, 576, 578, 580, 676
Explanation I	38
Explanation II. 15, 19, 34, 63, 100, 105, 106, 117, 367	
Explanation III	151, 153, 154, 154(<i>Ad.</i>), 155
Explanation IV	143, 145
Explanation V, Principle of—	210
—————applies also when the decision in the former suit was prior to the Civil Procedure Code of 1877	212
applies only when the claim in the former suit purported to be on behalf of the others also	212
applies even when permission to sue or defend on behalf of others not obtained... ..	214
applies when the claims to the right are not on the same title	217
Explanation VI	397, 568, 571
S. 14	18, 471, 573, 576, 580, 582
S. 15	284, 285, 286, 287
S. 16	316, 340, 370
S. 17	316, 373
Explanation I	354
Explanation II... ..	367
S. 18	322, 370
S. 19	370
S. 25	286, 470
S. 30	210, 214
S. 42	100
S. 43	109
S. 44 ... ..	..
S. 45 ... ..	..
S. 57 ... ..	..

	PAGE.
XVIII of 1884 (Punjab Courts Act)—	
S. 35	316
S. 39	312
S. 40	301, 302, 312
VIII of 1885—	
S. 158	277
VII of 1887 (Suits Valuation Act)—	
S. 11	420, 422
S. 158	124
IX of 1887—	
S. 23	298
XII of 1887 (Bengal and N. W. P. Civil Courts Act)—	
... ..	312
... ..	312, 315
S. 38	380
XVI of 1887 (Punjab Tenancy Act)—	
S. 76	272
XVII of 1887 (Punjab Land Revenue Act)—	
... ..	271
VII of 1888—	
... ..	579
S. 7	
VII of 1889 (Succession Certificates Act)—	
S. 26	
ADMINISTRATION—Effect of grant of—	513
ADMINISTRATOR—How far—represents deceased's heirs	196
ADMIRALTY—Jurisdiction of Prize and—Courts	523
ALIENATION—In suits for setting aside alienations, each—	
constitutes a distinct cause of action	648
—pending a contentious civil proceeding is voidable ...	694
Decision in a suit is <i>binding</i> against persons to whom— is	
made <i>pendente lite</i>	684
Such alienees need not be impleaded in the suit as parties	685
<i>See Lis Pendens.</i>	
APPEAL—A decision liable to—is <i>res judicata</i> until appealed	
against	144
After—a decision is <i>res judicata</i> only when confirmed ...	146
Order passed on—is binding in all subsequent stages	
of the suit	763
<i>Lis Pendens</i> applies till the decision of the—	700
Jurisdiction in case of—is determined by the value of	
the original suit	311

APPEAL—continued.

Jurisdiction of court of—not affected by defect of jurisdiction of lower court	460
ATTORNEY —Presumption in favor of authority of—	437
BAILOR —barred by a decision in a suit against a bailee	235
BAR BY JUDGMENT —Enactment of the rule of—in British India	7
—distinguished from bar by verdict	7
BAR BY SUIT —Principle on which the rule of—is based	613
distinguished from <i>res judicata</i>	615
Rule of—as enacted in India	615
Nature of claim and remedy for the rule of—	617
—applies only to claims and remedies in respect of same cause of action	618
depends entirely on the identity of cause of action	626
does not apply to suits for claims not known to plaintiff at the time of the suit	618
does not apply to claims beyond the jurisdiction of the court that decided the former suit	620
extends to subsequent suit by a party claiming under or representing a party in the former suit	622
extends to cross—claims by defendant	623
Suit for declaration of title to a property does not bar a suit for its possession	670
Suit for debt does not bar a suit for enforcing collateral security for the debt	672
Suit to recover maintenance does not bar a suit to have maintenance charged on any property	673
<i>See Cause of Action, Damages, Joint property, Mesne profits, Torts.</i>	
BAR IN SAME SUIT —Order in execution proceedings is a bar in all subsequent stages of those proceedings	759
An order passed on appeal is a bar in all subsequent stages of the suit	763
BAR BY VERDICT —Bar by Judgment distinguished from—	7
Principle of—acted upon by Indian courts on general principles	9
BAR FOR JOINTNESS —applies to joint contracts in England	737
—applies to joint contracts in the United States	743
Exceptions to the application of the bar in regard to joint contracts	745
—applies to joint contracts in British India	746
applies to joint tort-feasors in England	750
applies to joint tort-feasors in India	752
does not apply in case of torts in the United states	753
BENAMIDARS —are parties to a suit	161
CARRYING ON BUSINESS —Place of—	367

See Local Jurisdiction.

CAUSE OF ACTION —Difficulties experienced in the application of the rule of <i>res judicata</i> as enacted in the Civil Procedure Code of 1859 on account of the expression—	10
Signification of—	11, 344, 627
Identity of—	12
Identity of—not required now for <i>res judicata</i>	50
Identity of evidence is a test of identity of—	52
Decision of a suit on a preliminary point does not bar subsequent suit on the same—	109
In transitory suits jurisdiction exists also at the place of the accrual of—	342
Where a—accrues in suits on contracts	343
Bar by suit depends entirely on the identity of—	626
—must be looked for in the plaint	628
Unity of every tort as a—for all damages resulting from it	629
Mere continuance of tort is not a fresh—	637
The accrual of fresh damage from an act which is not wrongful without the damage constitutes a fresh—	639
Nuisance not necessarily permanent constitutes a fresh— for several properties misappropriated or wrongfully taken at the same time is the same... ..	640
The number or distance from each other of properties injured does not affect the unity of tort as a—	631
Essentially distinct injuries caused by the same tort constitute each a distinct—	633
Injuries to persons in different capacities are distinct—	635
In suits on title infringement of the title constitutes the— and each title does not constitute a separate—	644
In suits for setting aside alienations each alienation constitutes a distinct—	648
Breach of each of several contracts arising from same or similar facts constitutes a distinct—	649
Breach of several contracts made as a part of same transaction or in pursuance of one general contract constitutes only one—	651
Same principle applies to suits for wages due on account of work and labour	655
Breach of several covenants in one contract constitutes a distinct—when covenants are essentially distinct	656
breach of each of several covenants to be performed at different times constitutes a distinct—, except in regard to all covenants of which performance has become due, which all constitute only one—	659
Non-payment of all amounts accrued due in respect of same contract constitutes only one—	662

	PAGE.
Unity of breach of contract as a—for all damages...	664
Other instances of identity of—	666
Other instances of non-identity of—	667
CIVIL COURTS—have jurisdiction over all civil suits	243
—have not jurisdiction over suits for mere regulation of ritual or observance of religious honors	244
Jurisdiction of—over suits relating to rights to property or offices involving questions of religious rites or ceremonials	250
Jurisdiction of—over suits for recovery of fees annexed to an office	254
Jurisdiction of—over suits for voluntary offerings paid to wrong persons	255
Jurisdiction of—over caste questions	262
Jurisdiction of—over suits relating to marriage	266
Jurisdiction of—over suits relating to revenue or rent of revenue-paying lands	268
Small Cause Courts are—of exclusive though limited jurisdiction	277
COMITY—Defect of—as a basis of the recognition of foreign judgments	543
Obligation as a basis of the recognition of foreign judgments as a cause of action is perfected by—	545
See Foreign Judgments.	
CIVIL SUIT—	
Civil Courts have jurisdiction over every—	243
When a—becomes contentious for the rule of <i>lis pendens</i> ...	695
When a—may be said to terminate for the purposes of <i>lis pendens</i>	696
CLAIM—Nature of—for the rule of bar by suit	617
CO-HEIRS—See Privies.	
COLLATERAL SECURITY—A suit for debt does not bar a suit for enforcing a—for it... ..	672
CONCLUSIVENESS OF JUDGMENT—Enactment in British India of the rule of—	12
CONSENT—does not confer jurisdiction... ..	409
CONSTRUCTIVE NOTICE—Doctrine of <i>lis pendens</i> originally based on	688
See Notice.	
CONTRACT— <i>Forum</i> for suits on—	343
Suit for breach of—must include all prospective damages...	664
See Cause of action, Jurisdiction.	
COUNSEL—A Judge having acted as—of either party to a suit is disqualified from trying the suit... ..	388
COURTS—Presumption as to the existence of jurisdiction in regard to — of general jurisdiction	428

INDEX.

COURTS—continued.

	PAGE
—of general jurisdiction distinguished from—of limited jurisdiction	424
in protected Native States are foreign—for the purpose of the rule of <i>res judicata</i>	572
See Civil Courts, Jurisdiction.	
CROSS-CLAIMS.—Bar by suit applies to—	623
DAMAGES.—Subsequent suit will not lie even for—resulting from a tort subsequent to the first suit	636
Suit for breach of contract must include all prospective—	664
See Bar by suit.	
DEATH.—See parties.	
DECISION of a suit on a preliminary point does not bar a subsequent suit on the same cause of action	109
—on a preliminary point is <i>res judicata</i> as regards that point in a subsequent suit	113
Any matter not decided is not <i>res judicata</i>	115
Matter expressly left undecided is not deemed to have been decided	117
even though required to be decided for the decision of the suit	118
Reservation of any matter for—in a subsequent suit is not binding in that suit	121
—to be <i>res judicata</i> need not have been passed on evidence	123
in accordance with arbitrators' award may be <i>res judicata</i> ...	124
on compromise or confession is <i>res judicata</i> only in case of dismissal of suit	125
may be <i>res judicata</i> even though not specific and express...	127
on a matter in issue in a suit may be <i>res judicata</i> even when not embodied in the decree... ..	131
to be <i>res judicata</i> must be final	138
Extrinsic evidence may be admitted to determine the matters decided in the former suit	135
— <i>ex parte</i> may become final	143
Appealable—will be <i>res judicata</i> until it is appealed against	144
After appeal a decision is <i>res judicata</i> only if confirmed ...	146
Application for re-trial does not interfere with the finality of the--	147
—is final only if it forms the basis of the judgment ...	147
how far binding against persons having similar interests ...	203
of a Court not having jurisdiction over subject-matter is void	397
passed without reasonable notice to the persons concerned is contrary to natural justice	590
on jurisdictional facts cannot be attacked collaterally ...	438
See Jurisdiction, Parties, Privies	
DIRECTLY.—Matter must have been—in issue in the former suit.	54
When matter is—in issue	

See Issue.

DOMESTIC COURTS— <i>Lis pendens</i> attaches only to proceedings in—	730
DWELLING—Signification of the word—	348
ERROR—in the exercise of jurisdiction does not affect competency of jurisdiction	473
Mere—in a judgment does not invalidate the judgment...	482
ESTOPPEL— <i>Res judicata</i> distinguished from	5
Mistaken treatment of the doctrine of <i>res judicata</i> as— ...	4
Provision as to—against defendants	14
from proving want of jurisdiction in subsequent suit ...	416
from plea of want of jurisdiction in further proceedings ...	420
from plea of want of jurisdiction against foreign judgment...	567
EXECUTION-PROCEEDINGS—Jurisdiction over—	316
Order in—is binding on parties in all subsequent stages of the proceedings	759
EXECUTOR—How far—represents deceased's heirs	196
EX PARTE—decision may become final	143
FOREIGN COURT—Its finding in favor of its jurisdiction is not conclusive	198
Absence of jurisdiction of—may be shown by extrinsic evidence	558
Jurisdiction of—is primarily determined with reference to the laws of its own country	560
Jurisdiction of—generally recognized only if exercised in accordance with general principles of international law or of the law of the country in which the judgment may have to receive effect	562
Jurisdiction of French Courts over foreigners in suits on contracts made outside France not recognized in England and British India	566
Courts in Protected Native States are—for the purpose of the rule of <i>res judicata</i>	572
Pendency of suit in—will not operate as <i>lis pendens</i> ...	679
FOREIGNER.—Courts have no jurisdiction over non-resident— ...	373
Business carried on by—will not confer jurisdiction over him unless business is carried on by him personally.	361
Service of process personally on—outside the local jurisdiction of the Court will not confer jurisdiction over him	373
Presence of property of—will not confer jurisdiction over him	377
FOREIGN JUDGMENT—Recognition of—	537
Recognition due to the notion of comity	542
Recognition due to grounds of public policy and general justice	
Recognition based on obligation of payment of amount adjudged	

FOREIGN JUDGMENT—continued.

—as plea has always been considered conclusive in England...	546
—as a basis of claim long considered merely <i>prima facie</i> evidence	546
Ground of distinction between foreign judgment as a plea and as the basis of a claim... ..	547
That ground of distinction involves absolute inconsistency.	550
Entire explosion of that ground of distinction	552
General view of the limitations to the recognition of— ...	554
—to be valid must be of competent court	556
Estoppel from plea of want of jurisdiction against— ...	567
—recognized and enforced in India	570
Statutory extension of the rule of <i>res judicata</i> in India to—	18
—cannot be <i>res judicata</i> unless it were so in the country in which it was passed... ..	577
Limitations of the recognition of in India... ..	578
Enquiry into the merits of—of Courts in Asia and Africa...	579
—to be a bar must be on the merits... ..	580
to be a bar in India must not disclose on its face a mistake of International or of Indian law	582
Even apparent mistakes of International or English law do not now affect the binding force of—in England.. ...	584
Presumption of the correctness of a—as to the law of the country in which it was passed	584
—to be binding must not be contrary to natural justice ...	585
—to be <i>res judicata</i> must not have been obtained by fraud.	594
Character of fraud that will avoid—... ..	595
False testimony in Court will not avoid—	597
—to be <i>res judicata</i> must not sustain a claim founded on a breach of Indian law	598
to be <i>res judicata</i> must not be based on foreign penal law..	599
Recognition of—in <i>rem</i>	603
— <i>in rem</i> is not less binding if wrong	606
<i>in rem</i> is open to the same objections as that <i>in personam</i> ...	607
FOREIGN LAW —Foreign judgment to be <i>res judicata</i> must not be based on Penal—	599
FOREIGN STATES AND RULERS —Courts have no jurisdiction over—	
FRAUD in procuring a judgment does not render the judgment void	484
Judgment may be set aside for—in obtaining jurisdiction	
Foreign judgment to be <i>res judicata</i> must not have been obtained by—	594
character of fraud that will avoid foreign judgment ...	595
GARNISHEE —Decision against a—is valid against judgment-debtor only to the extent of compulsory payment by the garnishee	202

	PAGE
IDENTITY—of relief claimed not required for <i>res judicata</i> ...	49
of form of action not required for <i>res judicata</i>	50
of subject-matter not required for <i>res judicata</i>	40
of evidence is a test of—of cause of action... ..	53
of parties not affected by the change of their relative positions in the subsequent suit	79
of parties is not affected by omission from, or addition in, subsequent suit of any person	80
See Bar by Suit, <i>In pendeas</i>	
IMMOVABLE PROPERTY—Jurisdiction over suits for—	318
—outside a State is not subject to the jurisdiction of courts of that State	324
Conflict of opinion as to what suits were to be deemed as relating to—	318
Suit for an injunction against the continuance of a nuisance to—is not a suit for—	319
Whether a suit for carrying out trusts of a deed relating to—is a suit for—	319
Whether a suit for the specific performance of a contract for the transfer of—is a suit for—	320
See Local Jurisdiction.	
IN REM—See Judgments <i>in rem</i> .	
INSANE—may be a party to a suit so that a decision in it may be <i>res judicata</i> against him	74
IRREGULARITY—See Jurisdiction.	
ISSUE—Trial of—of law as well as of fact barred by the doctrine of <i>res judicata</i>	29
Amendment in the rule as enacted in the Civil Procedure Code of 1877 as to the—having been so directly and substantially in the former suit	19
Matter decided need not have been in—in a previously instituted suit	33
Matter must have been in—in another suit... ..	34
Matter in—distinguished from a matter of evidence ...	35
Matter in—distinguished from an—recorded as such ...	38
Matter may be in—even if neither party bound to plead it	39
Matter in—distinguished from subject-matter of suit ...	40
Matter in—distinguished from the object and the relief claimed	49
Matter in—distinguished from the form and cause of	
Matter must have been substantially and directly in—in the former suit	54
The trial of an—in a former suit will be barred even if it is only incidentally cognizable in the subsequent suit	55
When a matter is substantially in—	55

Issue—continued.

	PAGE
When a matter is directly in—	56
A fact of which the existence is not necessary to a judgment cannot be in—directly	60
Constructive extension of the expression—not a new rule...	63
All the grounds of defence are directly in—	65
Claims by defendant on separate cause of action are not deemed to be matter in—	69
Claims not inconsistent with plaintiff's claim are not deemed to be matter in—	71
Breach of warranty not in—in a suit for price of goods sold	73
Proper performance of a contract is not—in a suit on that contract	75
Matters in—in undefended suits	79
In undefended suits, only matters absolutely necessary for their decision are deemed to be in—	81
Amount of credit given by plaintiff to defendant in accounts is not directly matter in—in undefended suits for the balance	86
Only the grounds of the title forming the basis of the claim are matters in—	87
Conflict of opinion under the Civil Procedure Code of 1859 as to other titles being matter in—	92
Independent titles forming separate causes of action are under the present Code not matters in—in a suit on any one title	100
Grounds to be urged in plaintiff's rejoinder are grounds of attack and therefore matters in—	105
Matters not urged and not considered on appeal are deemed to be in—... ..	105
Grounds not existing at the time of the former suit are not matters in—	106
Matter in—not decided may be raised in a subsequent suit	115
Mere reservation of a matter in—for decision is not binding in the subsequent suit	121
Admissibility of extrinsic evidence for determining the matter in—decided in the former suit... ..	135
JOINTNESS—See Bar for Jointness.	
JOINT PROPERTY—A suit for a share in some—will bar a suit for a share in other—of the parties... ..	646
JUDGE—personal disqualification of presiding judge	380
Nature of interest causing disqualification of—	381
Relationship to either party causes disqualification of—... ..	385
Acting as counsel to either party to a suit causes disqualification of—... ..	388
Service under a Government is not disqualification for trying suits to which that Government is a party	389

	Page
JUDGMENT—by a Court without jurisdiction is void	397
—is void only so far as it is in excess of jurisdiction	400
Want of jurisdiction against some of the defendants does not avoid the—against the other defendants with- in jurisdiction	401
Irregularities in a process or its service do not render— void	464
Mere error in a—does not render it void... ..	482
Fraud does not render—void... ..	484
—may be set aside for fraud in obtaining jurisdiction	491
Enforcement in British India of Judgments by Courts in Native States	573
<i>See Bar by Judgment, Decision, Foreign Judgment.</i>	
JUDGMENTS <i>in personam</i> —are not <i>res judicata</i> against third persons even in regard to the relation created by them... ..	110
JUDGMENTS <i>in rem</i> —are exceptions from the rule as to Judg- ments <i>inter partes</i>	493
Universally binding effect of—is based on a notice of the proceedings to all persons	494
Usual description of—	499
How far judgments as to status of persons are—	500
Whether judgments of criminal courts are—	511
Restricted view taken of—by Indian Judges	501
What Judgments are usually considered to be—	505
What Judgments are usually considered to be—in British India... ..	507
Statutory recognition of—in British India	510
Effect of—	511
Effect of grant of probate or administration	514
Recognition of foreign—	603
Foreign—are not less binding, if wrong	606
Foreign—are open to the same objections as those <i>in</i> <i>personam</i>	607
<i>See Rem.</i>	
JURISDICTION—General conception of—	238
Constituents of—	239
—over subject-matter depends not on the existence of any facts, but on plaintiff's statement of the facts of the claim	240
of higher grades of Courts over certain suits and proceed- ings	281
over appeal is determined by value of the original suit	311
over execution proceedings	316
in proceedings <i>in rem</i>	516
in Prize and Admiralty proceedings... ..	523
in probate proceedings	282, 524
in suits for dissolution of marriage	283, 528
in insolvency proceedings	283

JURISDICTION—continued.

	PAGE
Court first taking cognizance has—in proceedings <i>in rem</i> ..	517
A court has—only to decide questions raised by the suit...	451
Court having—over a suit has—to grant only the relief awardable in the suit	454
—over subject-matter must exist throughout the proceed- ings in the suit	408
of Small Cause Courts in suits for damages not affected by plea of title to the property damaged	296
not divested by death of either party after institution of suit	406
Presumption as to the existence of—in regard to courts of general—	422
of limited Courts may be proved <i>aliunde</i>	433
Want of—against some of the defendants will not render judgment against the other defendants within—void	401
Consent does not confer—	409
Estoppel from proving want of—in subsequent suit ...	416
Estoppel against raising the plea of want of—in the same proceedings after a certain stage	420
Want of non-essential—may be waived	411
Waiver of defect of personal—	412
There is no waiver of want of—when it is objected against.	414
Conditions of the institution or cognizance of a suit do not	
Improper institution of proceedings does not affect com- petency of Courts'—	457
Insufficiency of description in plaint does not affect— ...	458
Insufficiency of affidavit does not affect—	460
Other provisions relating to procedure do not affect— ...	461
Effect on—of refusal to hear defence	462
Irregularities in process or its service do not affect— ...	464
Errors in the exercise of—do not affect competency of courts	470
Appellate Court's—not affected by defect of—of lower court.	460
Non-compliance with procedure essential for exercise of— may be waived	468
Judgment by Court without—is void	397
Judgment void only so far as in excess of—	400
Proceedings at unauthorized time or on holidays are not void	478
Proceedings at unauthorized place are not void	481
Amendment in the rule of <i>res judicata</i> as to the—of the court trying the subsequent suit	20
Concurrence of—	891

JURISDICTION—continued.

Concurrence of—required only in regard to subject-matter of suit	...
Competency of—does not involve finality of decision	392
See Civil Court, Foreign Courts, Foreign Judgments, Local Jurisdiction, Pecuniary Jurisdiction, Personal Jurisdiction.	
JURISDICTIONAL FACTS—Presumption in favour of existence of—	435
Decision on—cannot be attacked collaterally	438
LIS PENDENS—General doctrine of—	674
The statutory rule of—in India distinguished from that of <i>res judicata</i>	675
Existence of prior suit is essential for the application of the rule of—	676
Identity of relief asked is essential to the application of—	677
Identity of parties essential to the application of—	678
Pendency of a suit in a foreign Court will not operate as —	679
Character of the doctrine of—	682
Recognition and adoption of doctrine of—in British India originally based on constructive notice	688
—maintained on account of necessity and public policy	690
<i>Pendente lite</i> alienees not to be impleaded as parties in the suit on account of—	685
—applies only to alienations made pending a contentious civil proceeding	694
When a civil suit becomes contentious for the rule of—	695
When a civil suit terminates for the rule of—	696
Revival of suit after dismissal is a continuation of it	698
When an appeal lies in a decision against a suit, the suit is considered pending till the decision of the appeal	700
Proceedings on review are not a continuation of the suit or of its—	701
—applies only to alienations made during <i>bona fide</i> and diligent continuous prosecution of the suit	704
does not affect rights acquired before commencement of the suit	708
applies to every sort of alienation	710
applies to a sale in execution of a decree	711
applies only to an alienation of the rights of either of the parties	715
does not apply as between co-plaintiffs or co-defendants...	716
applies also to all personal property except negotiable paper not due	717
applies only to property specifically sued for	720
Litigation merely as to the title to any property not sufficient to affect it with—	721
—may apply even when the suit is not for recovery of property	722
Primary object of suit not material for the application of—	728

	PAGE.
LIS PENDENS — <i>continued</i> .	
Character of the description of the property to be affected by—.....	728
—attaches only to proceedings in Domestic Courts	730
Statutory systems of registration of—.....	732
LOCAL JURISDICTION —Provision as to—in the Civil Procedure Code of 1859 and the High Courts' Charters.....	318
Conflict of opinion under them as to what suits were to be deemed as relating to immovable property.....	318
—over suits for immovable property	318
Provisions as to—in the present Civil Procedure Code...	328
Suits relating to immovable property situate outside British India are beyond—of Courts in British India.....	824
Suits for torts to immovable property in foreign countries are beyond—of English Courts	326
Suits for personal relief arising out of contracts respecting immovable property situate in foreign country are within—of English Courts	334
Suits for relief relating to immovable property situate outside the—of the Court	340
Determination of—over movable property by its <i>situs</i>	341
—in transitory suits exists also at the place of the accrual of cause of action	
Conflict of opinion as to <i>forum contractus</i>	348
<i>Forum domicilii</i> and defendant's dwelling or residence how far a <i>forum</i> in transitory suits	347
Signification of the words dwelling and residence	348
Defendant's voluntary residence at the time of the institution of the suit is sufficient to confer—	
Character of business the carrying on of which can confer—	
Whether carrying on the business of the Government can confer—over the Government	356
Carrying on business by a foreigner does not confer—unless he carries it on personally.....	361
To confer—business need not be permanent.....	365
To confer—business need not be carried on in one place exclusively	366
Personally working for gain.....	366
MAINTENANCE —Suit to recover—does not bar a suit to have—charged on a property	673
MARRIAGE —Jurisdiction in suits for dissolution of—	528
MESNE PROFITS —A subsequent suit will not lie for—asked for and not decreed in previous suit	154
A suit for—will bar a subsequent suit for those accrued prior to the former suit	642
MINOR —may be a party to a suit so that a decision in it may be <i>res judicata</i> against him	73

	PAGE.
MISCELLANEOUS PROCEEDINGS—Local limits of jurisdiction over—	371
MOVABLE PROPERTY—Determination of jurisdiction over—by its <i>situs</i>	341
NATIVE STATES—Courts in—are Foreign Courts	572
Enforcement in British India of the judgments of Courts in—	578
NATURAL JUSTICE—refers generally to matters of procedure ...	587
Decision passed without reasonable notice to the persons concerned is contrary to—.....	590
Mere irregularity of notice does not involve contrariety to—	591
See Foreign judgment.	
NOTICE—The principle of bar by—applies to all the cases of warranty	228
The principle of bar by—applies to all the cases in which there is a responsibility over	230
The—given must be express... ..	231
Universally binding effect of judgments <i>in rem</i> is based on a—of the proceedings to all persons	494
Form and service of—in proceedings <i>in rem</i>	497
<i>Lis pendens</i> originally based on constructive— ...	688
Defect of the theory of notice	689
OBJECT—Identity of—not required for <i>res judicata</i>	49
ORDER—passed in execution proceedings is binding on parties in all subsequent stages of the proceedings	279
passed on appeal is binding on the parties in all the subsequent stages of the suit	280
PARTIES—A decision in a suit is <i>res judicata</i> only between the —and their privies	156
Who are—to a suit	157
Persons other than—on record when deemed—to a suit ...	158
Whether persons assuming right of controlling proceedings in a suit are—	159
Whether persons promoting suits in their own interest are parties	
<i>Benamidars</i> are—to a suit	161
Minors may be—to a suit	164
Persons of unsound mind may be—to a suit	166
—at the time of the decision of the suit are— ...	167
<i>Pro forma</i> defendants are—	168
A decision on an issue is <i>res judicata</i> only against—between whom that issue had arisen in the former suit ...	170
A decision on a matter in issue is <i>res judicata</i> even against—on the same side when there is active controversy between them about it	173

	PAGE.
PARTIES—continued.	
The identity of—not affected by the change of their relative positions in the subsequent suit	178
The identity of—is not affected by omission from, or addition in, subsequent suit of any person	180
Persons litigating otherwise than in the same quality are not the same—	181
A decision will not be <i>res judicata</i> in a subsequent suit between the co-heirs of one of the—in the former suit ...	187
—too numerous may in some cases be allowed to be represented by a few of them	210
A Court to be competent must have jurisdiction over the—to the suit	370
Identity of—essential to the application of <i>lis pendens</i> ...	678
<i>Pendente lite</i> alienees not to be impleaded in the suit as—...	685
An order in execution proceedings is binding on—in all subsequent stages of the proceedings	759
<i>Lis pendens</i> applies only to an alienation of the right of either of the—	715
PECUNIARY JURISDICTION—Limitations of court's—	283
No minimum limit of—	284
—is determined by <i>bona fide</i> valuation, given in the plaint, of the subject-matter	288
Amount proved or decreed does not affect jurisdiction ...	292
Nature of the defence or the defendants' plea does not affect—	293
—is determined by the amount of the claim made, and not by that of the demand or transaction from and out of which the claim has arisen... ..	298
—whether affected by inclusion of claim for interest ...	316
PERSONAL JURISDICTION—Courts must have—over the parties ...	371
Courts have no—over foreign states and rulers	372
A state is not subject to the jurisdiction of its own Courts...	372c
Courts have jurisdiction over all persons subject to, domiciled in, or present in the state at the time of the institution of the suit	372u
Courts cannot acquire jurisdiction over foreigners not present in the state merely by service of process on them...	372e
Presence of non-resident foreigner's property in a country does not give its courts jurisdiction over him	377
PERSONAL PROPERTY—<i>Lis pendens</i> applies to all—except negotiable paper not due	717
POSSESSION—Suit for declaration of title to property does not bar a suit for its—	670
PRESUMPTION—as to the existence of jurisdiction in regard to courts of general jurisdiction	424
This—may be rebutted by averments on record	429
This—may not be rebutted by extrinsic evidence ...	481

	PAGE.
PRESUMPTION—continued.	
in favor of existence of jurisdictional facts	435
as to the existence of attorney's authority	437
as to the attorney's authority may be rebutted	438
as to the correctness of a foreign judgment in regard to the law of the country in which it was passed	584
Conclusive effect of a finding as to service of process ...	443
PRIOR SUIT—Pendency of a— is essential for the applica- tion of <i>lis pendens</i>	250
PRIVIES— A decision in a suit is <i>res judicata</i> in regard also to—or persons claiming under parties to the suit ...	156
are those who become so after the prior suit	183
The claim must be one based on a title acquired sub- sequent to the former suit... ..	186
When one person is said to claim under another	187
A son in an undivided Hindu family does not claim under his father	194
Co-heirs do not claim under each other	195
Co-owners do not claim under each other	200
Purchaser at execution-sale does not claim under the judgment-debtor, the attaching creditor, or the bailiff conducting the sale	204
How far stock-holders claim under the corporation ...	205
Collateral heirs of a male taking after his widow repre- sent her and so may be bound by a <i>bona fide</i> decision against her	189
A decision against a remainderman is thus binding against subsequent remaindermen	192
A successor in office represents his predecessor, and is bound by decision against him	193
How far executors and administrators represent deceased's heirs	196
Attaching creditor does not represent the judgment- debtor	201
Garnishee represents judgment-debtor to the extent of compulsory payment by the former	202
Public corporations represent their members as well as the citizens	207
Master and principal, and servant and agent, how far bound by decisions against each other	218
Principal and surety how far bound by decisions in suits to which the surety or the principal respectively is a party	
A decision in a suit will bind every person responsible for its consequences	234
A bailor barred by a decision in a suit against a bailee ...	235
Persons having similar interests how far represented by each other	210
PROBATE— Effect of grant of—	513
Jurisdiction in proceedings for—	525

	PAGE.
PROCEEDINGS IN REM—All the world is supposed to be parties to—	497
of—	
Jurisdiction in	
PRO FORMA—defendant is a party .	
RELIEF—Identity of—claimed not required for <i>res judicata</i>	49
—claimed and not granted is deemed to have been refused.	151
Only a—independently claimed is deemed refused	153
Mesne profits asked and not allowed are deemed refused, even though they might not have been asked	154
Identity of—asked is essential for the application of <i>lis pendens</i>	677
REMEDY—Nature of remedy contemplated by the rule of bar by suit	617
REM—Necessity of notice in proceedings in—	494
Form and service of notice in proceedings in—	497
All the the world are party to proceedings in—	497
Jurisdiction in proceedings in—	516
<i>See</i> Judgments <i>in rem</i> .	
REPRESENTATION—How far a person representing another is bound by a decision against that other— <i>See</i> Privies.	
RESIDENCE—Signification of the word—	348
RES JUDICATA—Universal character of the doctrine of—	1
Roman notion of the doctrine of—	2
English notion of the doctrine of—	3
Mistaken treatment of the doctrine of—as an estoppel	4
—distinguished from estoppel	5
Adoption of the English doctrine of—in British India	6
Enactment of the rule of bar by judgment in British India.	7
Bar by judgment distinguished from bar by verdict	7
Principle of bar by verdict acted upon by Indian Courts on general principles	9
Difficulties experienced in the application of the rule of—as enacted in the Civil Procedure Code of 1859	10
Enactment in British India of the rule of conclusiveness of judgment...	12
The genesis of the rule of—enacted in the Civil Procedure Code of 1877	14
Provision as to estoppel against defendants	14
Constructive extension of the rule of—by Explanation II	15
Extension of the rule of—to foreign judgments	18
Present Indian rule of—	21
Incomplete character of the present rule of—	23
Bar by—is absolute and against all parties	23
Character of the trial barred by the rule of—	25
Character of the suit of which the trial will be barred by the rule of—	26

See Issue.

SUIT —Character of the—of which the trial will be barred	26
for observance of religious ritual or honors is not a civil—	
for pecuniary benefits depending on religious rites is a civil—	
for an office even though no fees are attached to it is a civil—	
for fees payable or paid to priests is a civil—	256
Bar in the same—	759
<i>See Bar by Suit, Jurisdiction, Lis pendens, Pecuniary Jurisdiction.</i>	
TITLE —in suits on—does not constitute the cause of action	644
A suit for declaration of—to a property does not bar a suit for possession of that property	670
TORT —Unity of—as a cause of action for all damages resulting from it	629
Each—constitutes a distinct cause of action	633
Mere continuance of tort does not give fresh—	637
<i>See Bar by Suit, Bar for jointness, Cause of action.</i>	
TRIAL —Character of—barred by <i>res judicata</i>	25
VALUATION OF SUBJECT-MATTER —for jurisdiction is not the... same always with that for the Court Fees Act	136
WAGES —Suits on account of—for work and labour done	655
WAIVER —No—of want of jurisdiction when it is objected to	414
of want of non-essential jurisdiction	
of defect of personal jurisdiction	
of personal disqualification of Judge	
WORKING FOR GAIN —Personally	

